Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNIROYAL GOODRICH TIRE COMPANY,

Petitioner,

vs.

ROBERTO O. MARTINEZ and JUANITA MARTINEZ, individually and as next friends of ROBERT MARTINEZ, JR. and JOHN MATHEW MARTINEZ, minors,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

BEN A. DONNELL
MEREDITH, DONNELL
& ABERNETHY, P.C.
One Shoreline Plaza
800 N. Shoreline
Suite 1500 - North Tower
Corpus Christi, Texas 78401
(512) 888-5551

TERRIANN TROSTLE
Counsel of Record
ANN E. WEBB
KATHLEEN WEISZ OSMAN
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney - Suite 5100
Houston, Texas 77010
(713) 651-5151

Attorneys for Petitioner

150983

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

13188

QUESTION PRESENTED FOR REVIEW

Does the due process clause of the Fourteenth Amendment require bifurcation of all trials in which punitive relief is sought because of the substantial risk that punitive damages evidence will taint the jury's liability and compensatory findings and because of the difficulty of identifying and addressing that taint on appellate review?

PARTIES, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Petitioner is The Uniroyal Goodrich Tire Company, a New York Partnership.

Respondents are:

Roberto O. Martinez
Juanita Martinez, individually and as next friends of
Robert Martinez, Jr., a minor and
Matthew Martinez, a minor.

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Appendix A — Substituted Opinions On Motion For Rehearing Of Cause Dated And Delivered October 15, 1998 ..... 1a

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Appendix E — Pronounced Order And Letter Order Of The Supreme Court Of Texas Dated November 12, 1998 Overruling The Motion For Rehearing 103a

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the Texas Supreme Court is reported at 977 S.W.2d 328 (Tex. 1998), and is reproduced in the Appendix hereto at A-1.

The opinion of the Texas Court of Appeals is reported at 928 S.W.2d 64 (Tex. App. — San Antonio 1995) and is reproduced in the Appendix hereto at B-1.

The judgment of the district court on the jury verdict was not reported, but is reproduced in the Appendix hereto at C-1.

The Charge of the Court to the Jury and Specific Findings of the Jury is reproduced in the Appendix hereto at D-1.

The Order of the Texas Supreme Court overruling Motion for Rehearing is reproduced in the Appendix hereto at E-1.

STATEMENT OF JURISDICTION

The Texas Supreme Court's opinion was issued on October 15, 1998. A motion for rehearing was denied on November 12, 1998. Appendix E-1. This Court has jurisdiction to review on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. XIV, § 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Background Facts

Roberto Martinez was injured when he failed to comply with conspicuous warnings placed on a 16" Goodrich tire that he was attempting to mount on a 16.5" rim manufactured by The Budd Company and designed by Ford Motor Company. The Goodrich warnings specifically advised of the danger of explosion if a tire was inflated on a mismatched rim and warned against the tire-changing procedures Martinez employed. Martinez, who saw the warnings, understood the warnings, and as an experienced mechanic, recognized the danger, nonetheless ignored all the warnings. As he was inflating the tire, the tire exploded and Martinez was injured. Appendix 2a-3a, 30a-31a.

Martinez sued Uniroyal Goodrich, Budd and Ford, seeking compensatory and punitive damages. Appendix 62a. Martinez did not claim that the Goodrich warnings were inadequate. Instead, Martinez contended that safer alternative designs of both the tire and the rim were feasible and would have prevented the explosion. Appendix 3a.

The uncontroverted evidence established that the Budd/Ford rim design was defective and could have easily been modified to prevent the accident. The Budd/Ford rim could have been designed to reject a 16" tire, but the Goodrich tire could not have been designed so that it could not be put on a 16.5" wheel. Furthermore, while Goodrich's tire came with prominent warnings,[1] the Budd/Ford rim came with no warnings

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1. The Goodrich tire bore a highlighted pictograph showing a worker being thrown into the air by an exploding tire, and a red and (Cont'd)

whatsoever. Expert evidence showed that the rim size, which was not prominently marked, should have been displayed in the wheel well where it could not have been obscured. Appendix 45a-47a.

Budd and Ford settled with Martinez prior to trial, and the trial proceeded against Goodrich alone. Appendix 3a.

B. Bifurcation is Requested and Denied

To avoid the prejudicial impact of punitive damages evidence on the liability and compensatory damages issues, Goodrich requested a bifurcated trial. The trial court denied Goodrich's timely motion to bifurcate. Appendix 29a. Goodrich also objected to the jury charge as violative of the United States and Texas constitutions. Statement of Facts, April 14, 1993, p. 1221.

In the unified trial of liability and punitive damages, the trial court admitted evidence of thirty-four other lawsuits against Goodrich involving mismatched tires.[2] Martinez' counsel commented, when questioning his expert, that: "it takes only twenty-nine or thirty people to get killed or injured before

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(Cont'd)

yellow warning never to mount a 16" diameter tire on a 16.5" rim, never to inflate a tire that is lying on the floor or other flat surface, never to inflate to seat beads without using an extension hose with gauge and clip-on chuck, and never to stand, lean or reach over the assembly during inflation. It advised that failure to comply with these safety precautions can cause serious injury or death. Appendix 2a.

2. Goodrich objected to this evidence on the ground that insufficient similarity had been shown, because thirty-three of those lawsuits involved tires without the pictographic warning label that was on the tire at issue. Appendix 24a-25a.

[the tire company comes] to the conclusion that maybe they ought to change their [tire]." Appendix 57a. He asked Goodrich's expert: "So how many people have you all killed?" *Id.* During closing arguments, Martinez' counsel urged the jury to award Martinez $500,000 for each of the thirty-four other lawsuits filed against Goodrich, "so as to send a 'message back to Akron.' " Appendix 30a. Evidence was also admitted that Budd had been involved in 132 previous lawsuits regarding the same rim. Appendix 73a. Because Budd and Ford had settled, however, Martinez' counsel made no comparable inflammatory argument against Budd or Ford.

C. Trial Outcome

Under Texas law, the jury may be asked to determine liability of settling defendants as well as those who proceed to trial. TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(3) (Vernon Supp. 1993) (amended 1995).[3] Thus, comparative responsibility jury findings were requested concerning liability of Budd and Ford, as well as Goodrich and Martinez. Appendix 95a.

Despite the overwhelming evidence of liability on the part of Budd and Ford and of contributory negligence by Martinez, the jury attributed no fault to those parties. Instead it found Goodrich 100% liable and awarded $5.5 million in actual damages and $11.5 million in punitive damages.[4] Appendix 62a, 95a.

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3. This case was tried in 1993. Accordingly, the version of the statute cited above governed.

4. After reducing the actual damages by $1.4 million pursuant to Martinez' settlement agreement with Budd and Ford, reducing punitive damages to the amount of actual damages pursuant to a pre-trial agreement between Goodrich and Martinez, and awarding pre-trial interest, the trial court rendered judgment for $10,308,792.45. Appendix 62a, 85a-87a.

The Court of Appeals reversed the jury award of punitive damages, finding no support in the record. However, it affirmed the jury's liability findings and actual damages award. It did not address Goodrich's challenge to the trial court's denial of bifurcation. *See generally*, Appendix B.

The Texas Supreme Court affirmed the decision of the Court of Appeals. Appendix 2a. While acknowledging that the trial court erroneously denied bifurcation, the Supreme Court held that failure to bifurcate was harmless error. Appendix 29a-30a. A vigorously dissenting minority took the majority to task for its "aberrant" opinion. Appendix 32a. The Court's four dissenting justices concluded that "[t]he court's error [in failing to bifurcate the trial] clearly prejudiced Goodrich." Appendix 59a.[5]

REASONS FOR GRANTING THE WRIT

I.

THERE IS A SIGNIFICANT CONFLICT AMONG THE STATES IN CONSTRUING THIS COURT'S CONSTITUTIONAL DIRECTIVES IN *HASLIP*, *TXO*, AND *BMW* WHEN DETERMINING WHETHER BIFURCATION IS CONSTITUTIONALLY REQUIRED.

In holding that the failure to bifurcate was harmless error, the Texas Supreme Court has completely failed to recognize the constitutional basis for bifurcation, and has abdicated its responsibility to insure due process to defendants who face significant prejudice, not just as to punitive damages, but with respect to liability and compensatory damages findings as well. In accord with the Alabama Supreme Court, and in conflict

5. Four justices dissented as to the liability findings against Uniroyal and as to the ruling regarding bifurcation. Three justices dissented as to the finding of no liability on the part of Budd, Ford and Martinez. Appendix 30a-60a.

with the decisions of other State courts, the Texas Supreme Court has failed to recognize that failure to bifurcate is *always* harmful error. *Compare Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328 (Tex. 1998) (finding failure to bifurcate harmless error); *Life Ins. Co. of Ga. v. Johnson*, 701 So.2d 524, 531 (Ala. 1997) (due process does not require bifurcation); and *Hilao v. Estate of Marcos*, 103 F.3d 767, 781 (9th Cir. 1996) (due process does not require punitive damage phase to be decided after compensatory damages phase), *with W. R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994) (under *Haslip*, requiring bifurcation); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) (citing *Haslip* and requiring bifurcation); *see also Scheufler v. General Host Corp.*, 126 F.3d 1261, 1272 (10th Cir. 1997) (bifurcation is a considerable procedural safeguard in analyzing appropriateness of a second award of punitive damages against a single defendant for the same or similar conduct).[6]

In determining whether due process requires bifurcation to protect liability and compensatory damages findings from the prejudicial impact of punitive damages evidence, lower courts have looked to this Court's directives in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), and *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). The courts analyzing these opinions, however, have found no concrete guidance and have reached conflicting conclusions.

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6. Despite admittedly adequate warnings, the jury was able to find 100% liability on Goodrich, without finding any liability on the part of the rim maker or designer, neither of whom provided any warning of the danger. Had this same case been tried in a federal court in either the Fifth or Eleventh Circuits, this result would not have occurred. *See Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1235; *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1056-59 (11th Cir. 1994).

For example, "mindful of the concerns of the Supreme Court in *Haslip* that the procedures followed in punitive damages cases must accord with due process," the Florida Supreme Court has mandated bifurcation. *W.R. Grace*, 638 So.2d at 506. Similarly, the Supreme Court of Tennessee followed *Haslip* in determining that bifurcation is required, as "unlimited jury discretion . . . in fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Hodges*, 833 S.W.2d at 900-01.

By contrast, in reliance on *BMW*, the Alabama Supreme Court, which had earlier required bifurcation, determined that bifurcation was *not* necessary to assure due process. *Johnson*, 701 So.2d at 531-32. Similarly, citing *Haslip*, *TXO* and *BMW*, the Ninth Circuit concluded that due process does not require that punitive damages be decided after an award of compensatory damages. *Hilao*, 103 F.3d at 781 (9th Cir. 1996).[7]

Under the conflicting case law cited above, depending upon the State or circuit in which an incident such as this one happens, Goodrich may or may not receive constitutionally adequate protection against a jury verdict inflamed by passion and prejudice.[8] Goodrich, as a company engaged in national commerce whose tires are placed on cars and trucks that traverse the entirety of this country, has a legitimate expectation of uniformity.

These conflicting opinions are resounding evidence of the need for this Court to address this important constitutional issue.

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7. The punitive and compensatory damages portions of that trial were, however, bifurcated.

8. Texas does not have the right to subject a company engaged in nationwide commerce to biased and prejudicial trials that would not occur in other States where bifurcation is constitutionally mandated. *See BMW*, 517 U.S. at 585-86.

This Court should resolve this conflict and provide a uniform rule of law requiring the fundamental procedural safeguard of bifurcation.

II.

WHETHER BIFURCATION IS CONSTITUTIONALLY REQUIRED IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The outcome here demonstrates the inflammatory spillover that occurs when punitive damages issues are not separated from liability and compensatory issues. The evidence of liability against Budd and Ford was far more compelling than that against Goodrich. Yet, astonishingly, the jury attributed no fault to Budd or Ford and 100% fault to Goodrich. The distinguishing factor: only Goodrich was subjected to inflammatory punitive damages argument.

This taint to liability and compensatory findings is immeasurable, and the harm cannot be quantified or remedied on appeal. Whether the due process clause requires bifurcation of all punitive damages trials as a prophylactic measure is an important federal question that merits this Court's attention.

A. Due process concerns are plainly implicated.

This Court considers three factors to determine what process is constitutionally required.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the

> Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Application of these factors leads to the conclusion that due process requires bifurcated trials when punitive damages are sought.

1. Litigants have a substantial private interest in avoiding unwarranted assessment of liability and damages.

Litigants have a substantial interest in avoiding unwarranted damages, both punitive and compensatory. This Court has already recognized that the size and circumstances of punitive damages awards may violate due process concerns. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. at 559.

The risk of overreaching actual damages, however, may present an even greater threat than the threat of enormous punitive awards. In Texas and in many other states, a punitive damages award may be limited by statute. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997). *See also* GA. CODE ANN. § 51-12-5.1(d)(1)-(2) (Supp. 1998); OHIO REV. CODE ANN. § 2315.21 (C)-(D) (Anderson Supp. 1997). The size of compensatory awards, however, is rarely statutorily circumscribed and might indeed cause financial ruin. Thus, litigants have a substantial private interest in avoiding compensatory damage awards that might be improperly inflated by inflammatory punitive damages evidence.

Likewise, litigants have a substantial private interest in avoiding the stigma of an unwarranted liability finding. *See, e.g., Wisconsin v. Constantinau*, 400 U.S. 433, 437 (1971)

(when "the State attaches 'a badge of infamy' to the citizen, due process comes into play"); *In re Winship*, 397 U.S. 358, 363 (1970) (the "certainty that [the defendant] would be stigmatized by the conviction" is one of the interests at stake when determining what procedural due process is required).

Thus, defendants have a substantial, two-fold interest at stake. They seek to avoid both unwarranted findings of liability against them and unwarranted or excessive compensatory damages awards. *See generally* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (hereinafter cited as "Wheeler").

2. The risk of jury taint is substantial in non-bifurcated trials, and the value of bifurcation is great.

Non-bifurcated trials create a substantial risk that the jury might incorrectly find liability and might award an excessive amount of compensatory damages. *See* Wheeler, 69 VA. L. REV. at 284-85. In unified trials, the jury hears evidence relevant *only* to punitive damages issues prior to deciding liability and compensatory damages. Although punitive damages evidence takes various forms, the plaintiff generally attempts to prove his punitive damages case by introducing evidence of the defendant's alleged wealth or malice.

The prejudicial nature of this type of evidence is widely acknowledged. Numerous jurisdictions have recognized that evidence of a defendant's wealth, although relevant to the issue of punitive damages, is prejudicial if considered when assessing compensatory damages. *See, e.g., W.R. Grace & Co. v. Waters*, 638 So.2d 502, 506 (Fla. 1994); *Feld v. Merriam*, 485 A.2d 742, 748 (Pa. 1984); *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981); *Farmy v. College Housing, Inc.*, 121 Cal. Rpt.

658, 670 (1975); *Life & Cas. Ins. Co. v. Padgett*, 407 S.W.2d 728, 730 (1966). Where compensatory and punitive issues are tried together, there is no way to determine whether a liability finding in a close case or an award of high compensatory damages resulted from prejudicial punitive damages evidence.

The risk of jury contamination becomes more pronounced when, as here, the punitive award was not warranted. The court of appeals cannot "unring that bell." Although the punitive award was not warranted, the inflammatory evidence was before the jury when it made its findings of liability and compensatory damages. Where the jury erred in awarding punitive relief, the likelihood increases that its liability and/or compensatory damages findings also were influenced by the same passion or prejudice that resulted in the unwarranted punitive award. *See* Wheeler, 69 VA. L. REV. at 288-89.

The most insidious aspect of this type of jury contamination is that it is often obscured. The procedural posture below, requiring liability findings as to settling defendants but subjecting only Goodrich to punitive damages argument, as well as the ultimate outcome, finding Goodrich 100% liable, illuminates the problem of jury taint. By contrast, where there is only a single defendant or when all defendants are subjected to punitive damages argument, a reviewing court cannot discern the impact the punitive damages argument might have had on liability findings. Moreover, as long as a jury's compensatory damages award falls within the continuum of the amount suggested by the defendant and that sought by the plaintiff, a reviewing court cannot know whether the award was tainted.

Many courts have recognized the difficulty, if not the impossibility, of determining the impact of jury contamination. Consequently, when reversing a punitive award, courts have remanded liability and/or compensatory damages issues for a new trial. *See, e.g.*, *Campen*, 635 P.2d at 1132 (remanding entire

case for new trial because "[i]t is impossible to say that the jury's verdict of compensatory damages was not affected by its knowledge that [the defendant] had a deep pocket"); *Padgett*, 407 S.W.2d at 730 (recognizing that "[i]t is hardly possible that the jury did not take [punitive damages] into consideration in fixing [compensatory damages]" and holding that the only way "to protect the appellants from the possibility of prejudice is to grant a new trial upon all issues"); *Kieninger v. New York*, 384 N.Y.S.2d 11, 12 (App. Div. 1976) (remanding for a new trial of compensatory damages because the jury, in reaching compensatory damages verdict, may have considered the amount of punitive damages awarded); *Farmy*, 121 Cal. Rptr. at 670 (remanding for retrial of compensatory damages because improper punitive evidence "tainted the award for compensatory damages"); *see also Parsons v. First Investors Corp.*, 122 F.3d 525, 529 (8th Cir. 1997) (general rule is that where a punitive damages award is the result of passion and prejudice, new trial is required due to the concern that the liability finding may have been compromised); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985) (remanding for new trial of compensatory damages because of prejudicial argument that jury should act as "community conscience").

Other courts, however, including the Texas courts here, simply fail to recognize the jury contamination that can result from inflammatory punitive damages evidence, and affirm liability and compensatory damages findings even when they reverse punitive awards. *See, e.g., Rosener v. Sears, Roebuck & Co.*, 168 Cal. Rptr. 237, 245-46 (1980). If reviewing courts can overlook taint — as the majority did below — when the evidence of jury bias is overwhelming, it is fair to assume that they will fail to recognize the problem where the taint is obscured. Any presumption of an effective post-trial remedy is therefore illusory, and does not satisfy due process.[9]

9. The after-the-fact remedy of a new trial also is inefficient and costly to the parties and the judicial system.

Trial bifurcation, however, is a simple and effective remedy. Whether or not they have recognized bifurcation as constitutionally required, numerous jurisdictions, including Texas itself, have recognized the value of bifurcated trials in preventing jury contamination where punitive relief is sought. At least eight jurisdictions have enacted bifurcation statutes,[10] and a number of other jurisdictions judicially mandate bifurcation to permit the trial of punitive damages issues only after the jury has rendered a verdict on liability and compensatory damages.[11]

Unquestionably, bifurcation protects against and reduces the risk of erroneous verdicts. *See e.g.*, *Scheufler v. General Host Corp.*, 126 F.3d 1261, 1272 (10th Cir. 1997) (bifurcation is a considerable procedural safeguard); *Parsons*, 122 F.3d at 529 (because trial was bifurcated, no risk that improper closing argument affected liability and compensatory damages

10. *See* 735 ILL. COMP. STAT. ANN. 5/2-1115.05(c) (Supp. 1998); KAN. STAT. ANN. § 60-3701(a) (1994); OKLA. STAT. ANN., Tit. 23, § 9.1 (B-D) (West Supp. 1999); MINN. STAT. ANN. 549.20(4) (West Supp. 1999); MO. ANN. STAT. § 510.263(1)-(4) (West Supp. 1998); MONT. CODE ANN. 27-1-221(7) (1997); NEV. REV. STAT. § 42.005(3) (1997); N.D. CENT. Code § 32-03.2-11(1)-(3) (Supp. 1997); *see also* CAL. CIV. CODE § 3295(d) (West 1997); GA. CODE ANN. § 51-12-5.1(d)(1)-(2) (Supp. 1998); OHIO REV. CODE ANN. § 2315.21(C) (Anderson Supp. 1997); UTAH CODE ANN. 78-18-1(2) (1996).

11. *See, e.g., Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994); *W.R. Grace*, 638 So.2d at 506 (holding "henceforth trial courts, when presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues at trial"); *Hodges v. S. C. Tool & Co.*, 833 S.W.2d 896, 900-01 (Tenn. 1992) (setting forth a new procedure, including bifurcated trial, aimed at guiding a jury in deciding whether to award punitive damages and, if so, in what amount); *Campen*, 635 P.2d at 1132 (reasoning that it was impossible to say that the jury's verdict of compensatory damages was not affected by its knowledge that the defendant had a deep pocket from which any award would be satisfied).

determination); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994) (mandating bifurcation to avoid the "very real potential for prejudicing the jury's determination of other disputed issues in a tort case."); *Campen*, 635 P.2d at 1131 (bifurcation provides the defendant "a prejudice-free atmosphere in which his liability may be assessed"). Bifurcation permits the jury to make findings on liability and compensatory damages issues before hearing inflammatory evidence of wealth and malice that is admissible only on the punitive damages issue. Moreover, when a higher burden of proof is required on the punitive damages issues, bifurcation also reduces the jury's confusion by allowing it to separate evidence that must be considered under a preponderance of the evidence test from evidence that must be considered under a clear and convincing evidence test. Wheeler, 69 VA. L. REV. at 301, 321.

3. The government's interest will not be prejudiced and is likely to be advanced by bifurcation.

To the extent that the government shares the interest of the public at large in deterrence of and retribution for outrageous conduct, that interest is confined to achieving those goals through the *equitable* imposition of punitive damages. A bifurcated trial provides a prejudice-free atmosphere for the defendant, while preserving society's interest in effecting punishment and deterrence for socially outrageous conduct. *Campen*, 635 P.2d at 1131. Thus, bifurcation does not threaten the government's interest in securing punitive damages where they are warranted.

Likewise, the government has an interest in ensuring that liability and compensatory damages determinations are just. Bifurcation furthers that governmental interest by eliminating the risk that inflammatory punitive damages evidence might result in an improper liability and compensatory damages result.

See Parsons, 122 F.3d at 529. Further, when a higher burden of proof is required on punitive damages issues, bifurcation eliminates the likelihood of juror confusion arising from having to apply two standards of proof simultaneously. Wheeler, 69 VA. L. REV. at 301, 321.

Bifurcation decreases the court's fiscal and administrative burdens in every case in which the defendant prevails on the issue of liability, thus eliminating the need to litigate punitive damages. Additionally, without any basis to argue that inflammatory evidence influenced liability and compensatory findings, there should be fewer grounds for appeal. Finally, less trial time will be consumed by issues relating to the presentation of evidence on these conflicting elements. *See* Wheeler, 69 VA. L. REV. at 321-22.

B. This Court should address this important issue.

This Court has recognized that punitive damages awards implicate due process concerns. *See, e.g., BMW*, 517 U.S. at 568 (setting forth factors to consider in determining excessiveness); *TXO Prod. Corp.*, 509 U.S. at 462 (holding that punitive award was not so grossly excessive as to violate due process); *Haslip*, 499 U.S. at 19 (concluding that punitive award at issue did not violate due process clause).

This Court has not, however, expressly addressed the due process concerns raised by the impact of inflammatory punitive damages evidence on determinations of liability and compensatory damages. Lower courts have looked to this Court for guidance in determining whether due process demands the safeguard of bifurcated trials when punitive damages are at issue. The fact that they have found no express pronouncement on this issue and have reached conflicting results demonstrates that this issue deserves the attention of this Court.

CONCLUSION

For the foregoing reasons, Petitioner Uniroyal Goodrich Tire Company requests that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

TERRIANN TROSTLE
Counsel of Record
ANN E. WEBB
KATHLEEN WEISZ OSMAN
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney - Suite 5100
Houston, Texas 77010
(713) 651-5151

BEN A. DONNELL
MEREDITH, DONNELL
& ABERNETHY, P.C.
One Shoreline Plaza
800 N. Shoreline
Suite 1500 - North Tower
Corpus Christi, Texas 78401
(512) 888-5551

Attorneys for Petitioner

APPENDIX

APPENDIX A — SUBSTITUTED OPINIONS ON MOTION FOR REHEARING OF CAUSE DATED AND DELIVERED OCTOBER 15, 1998

SUBSTITUTED OPINIONS ON MOTION FOR REHEARING OF CAUSE

UNIROYAL GOODRICH TIRE COMPANY

vs.

ROBERTO O. MARTINEZ ET UX.

No. 95-1159

* * *

OPINION

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE GONZALES, JUSTICE SPECTOR, JUSTICE ABBOTT and JUSTICE HANKINSON join.

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE ENOCH and JUSTICE BAKER join, and in which JUSTICE OWEN joins in all but Part II.

Petitioner's motion for rehearing is overruled. We withdraw our opinion of July 3, 1998, and substitute the following opinion.

We must decide whether a manufacturer who knew of a safer alternative product design is liable in strict products liability for injuries caused by the use of its product that the user could have avoided by following the product's warnings. The court of appeals held that the mere fact that a product bears

an adequate warning does not conclusively establish that the product is not defective. 928 S.W.2d 64. Because we agree, we affirm the judgment of the court of appeals.

I

Roberto Martinez, together with his wife and children, sued Uniroyal Goodrich Tire Company ("Goodrich"), The Budd Company, and Ford Motor Company for personal injuries Martinez suffered when he was struck by an exploding 16" Goodrich tire that he was mounting on a 16.5" rim. Attached to the tire was a prominent warning label containing yellow and red highlights and a pictograph of a worker being thrown into the air by an exploding tire. The label stated conspicuously:

DANGER

> NEVER MOUNT A 16" SIZE DIAMETER TIRE ON A 16.5" RIM. Mounting a 16" tire on a 16.5" rim can cause severe injury or death. While it is possible to pass a 16" diameter tire over the lip or flange of a 16.5" size diameter rim, it cannot position itself against the rim flange. If an attempt is made to seat the bead by inflating the tire, the tire bead will break with explosive force.
>
> . . .
>
> NEVER inflate a tire which is lying on the floor or other flat surface. Always use a tire mounting machine with a hold-down device or safety cage or bolt to vehicle axle.
>
> NEVER inflate to seat beads without using an extension hose with gauge and clip-on chuck.

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> NEVER stand, lean or reach over the assembly during inflation.
>
> . . .
>
> Failure to comply with these safety precautions can cause the bead to break and the assembly to burst with sufficient force to cause serious injury or death.

Unfortunately, Martinez ignored every one of these warnings. While leaning over the assembly, he attempted to mount a 16" tire on a 16.5" rim without a tire mounting machine, a safety cage, or an extension hose. Martinez explained, however, that because he had removed a 16" tire from the 16.5" rim, he believed that he was mounting the new 16" tire on a 16" rim. Moreover, the evidence revealed that Martinez's employer failed to make an operable tire-mounting machine available to him at the time he was injured, and there was no evidence that the other safety devices mentioned in the warning were available.

In their suit, the Martinezes did not claim that the warnings were inadequate, but instead alleged that Goodrich, the manufacturer of the tire, Budd, the manufacturer of the rim, and Ford, the designer of the rim, were each negligent and strictly liable for designing and manufacturing a defective tire and rim. Budd and Ford settled with the Martinezes before trial, and the case proceeded solely against Goodrich.

At trial, the Martinezes claimed that the tire manufactured by Goodrich was defective because it failed to incorporate a safer alternative bead design that would have kept the tire from exploding. This defect, they asserted, was the producing cause

of Martinez's injuries. Further, they alleged that Goodrich's failure to adopt this alternative bead design was negligence that proximately caused Martinez's injury.

The bead is the portion of the tire that holds the tire to the rim when inflated. A bead consists of rubber-encased steel wiring that encircles the tire a number of times. When the tire is placed inside the wheel rim and inflated, the bead is forced onto the bead-seating ledge of the rim and pressed against the lip of the rim, or the wheel flange. When the last portion of the bead is forced onto this ledge, the tire has "seated," and the air is properly sealed inside the tire. The bead holds the tire to the rim because the steel wire, unlike rubber, does not expand when the tire is inflating. The tire in this case was a 16" bias-ply light truck tire with a 0.037" gauge multi-strand weftless bead, or tape bead, manufactured in 1990. A tape bead consists of several strands of parallel unwoven steel wires circling the tire with each layer resting on top of the last, similar to tape wound on a roll. After a number of layers have been wound, the end of the bead is joined, or spliced, to the beginning of the same bead to form a continuous loop.

The Martinezes' expert, Alan Milner, a metallurgical engineer, testified that a tape bead is prone to break when the spliced portion of the bead is the last portion of the bead to seat. This is commonly called a hang-up. Milner testified that an alternative bead design, a 0.050" gauge single strand programmed bead, would have prevented Martinez's injuries because its strength and uniformity make it more resistant to breaking during a hang-up. Milner explained that the 0.050" single strand programmed bead is stronger because it is 0.013" thicker and that it is uniform because it is wound, or programmed, by a computer, eliminating the spliced portion of the bead that can cause the tire to explode during a hang-up.

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According to Milner, Firestone was the first to document that tape beads were prone to break during hang-ups in a 1955 patent application. This application, which was granted three years later, stated in part:

> It has developed that in tires of the type now in common use that the grommet of wire used becomes ruptured or broken too frequently at or near the end of the wire splice when the tire bead is forced onto the rim bead seat during mounting of the tire. Applicant has discovered that such breaking of the bead wire occurs most frequently when the spliced portion of the bead wire grommet is located in the last portion of the tire bead to be seated on the rim, and they have noted that when an end of the said wire ribbon was disposed on the radial inner surface of the bead grommet that the break started at or adjacent to that point.

Milner testified that the design of the bead in the Goodrich tire in question was the same design criticized in the patent. Milner also testified, relying on an internal memorandum that was admitted into evidence, that in 1971 General Tire, one of Goodrich's competitors, knew its tape bead design was prone to break during hang-ups.

In 1966, 16.5" wheel rims were first introduced into the American market.[1] Milner testified that Uniroyal, Inc. and B.F. Goodrich Company, who in 1986 merged to form Goodrich, soon became aware that mismatching their 16" tires with the new wheel rims often caused hang-ups that resulted in broken

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1. The rim involved in this case was manufactured in 1979. The Budd Company ceased manufacturing 16.5" rims in 1983.

beads. The minutes of a 1972 meeting of the Rubber Manufacturers Association ("RMA"), of which both Uniroyal, Inc. and B.F. Goodrich were members, provided:

> Mounting of LT [light truck] tires. Attention was drawn to reports that there have been instances where 16" LT tires have been mounted on 16.5" rims and 14" tires on 14.5" rims. It was proposed and approved to request the Service Managers Committee to add a cautionary statement to RMA documents.

Similarly, the minutes from a 1972 meeting of the Tire and Rim Association, of which Uniroyal, Inc. and B.F. Goodrich were both members, provided:

> It was reported that there have been incidents where 14" and 16" tires have been mounted on 14.5" and 16.5" rims that have resulted in broken beads. The Rim Subcommittee of the Technical Advisory Committee was requested to consider some method of marking 15" Drop Center rims and wheels to avoid this practice.

Finally, Milner testified that B.F. Goodrich's own testing department was aware by at least 1976 that a 16" tire mounted on a 16.5" rim would explode during a hang-up. A B.F. Goodrich "test request" of that year was entered into evidence indicating that a 16" tire would explode when mounted on a 16.5" rim at 73 psi (pounds of pressure per square inch). The test request further indicated that "inspection revealed break was at [illegible] ends of bottom layer of [bead] wires as anticipated." The stated "Object of Test" was: "To develop

demonstrative evidence & data for use in lawsuits involving broken beads."

Milner explained that the computer technology required to manufacture the programmed bead was developed in 1972 and widely available by 1975. Milner testified that Goodyear began using a 0.051" gauge single strand programmed bead in its radial light truck tires in 1977, and that Yokohama began using a single strand programmed bead in its radial light truck tires in 1981. Milner also testified that General Tire began using a single strand programmed bead in its bias-ply light truck tires in 1982. Finally, Milner testified that Goodrich itself began using the single strand programmed bead in its 16" radial light truck tires in 1991.[2] Based upon this evidence and his expert opinion, Milner testified that the tire manufactured by Goodrich with a tape bead was defective and unreasonably dangerous. Because Goodrich had also been sued in thirty-four other lawsuits alleging accidents caused by mismatching Goodrich tires, Milner asserted that Goodrich was grossly negligent in failing to adopt the 0.050" single strand programmed bead in its bias-ply 16" light truck tires.

Milner also testified that the rim designed by Ford and manufactured by Budd was defective because its size was not clearly marked on it and because it could have been redesigned to prevent a 16" tire from passing over its flange.

The jury found that Goodrich's conduct was the sole proximate cause of Martinez's injuries and that Goodrich was grossly negligent. Furthermore, the jury found that the tire manufactured by Goodrich was defective, while the wheel rim designed by Ford and manufactured by Budd was not defective.

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2. Goodrich has ceased manufacturing bias-ply light truck tires.

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The jury allocated 100% of the producing cause of Martinez's injuries to the acts and omissions of Goodrich.

The jury awarded the Martinezes $5.5 million in actual damages and $11.5 million in punitive damages. After reducing the award of actual damages by $1.4 million pursuant to a settlement agreement between the Martinezes, Ford, and Budd, reducing the punitive damages to the amount of actual damages pursuant to a pretrial agreement between Goodrich and the Martinezes, and awarding prejudgment interest, the trial court rendered judgment for the Martinezes for $10,308,792.45.

The court of appeals affirmed the award of actual damages, holding that there was legally sufficient evidence to support the finding of a design defect based upon its examination of the following factors: (1) the availability of safer design alternatives; (2) similar accidents involving the same product; (3) subsequent changes or modifications in design; (4) out-of-court experiments indicating Goodrich's knowledge of a design defect; and (5) expert testimony claiming a design defect. 928 S.W.2d at 70. The court rejected Goodrich's argument that Martinez's failure to heed the product's warnings was a complete defense to the product defect claim. However, the court of appeals reversed and rendered the award of punitive damages, holding that there was no evidence to support the jury's finding of gross negligence.

Only Goodrich applied to this Court for writ of error. As in the court of appeals, Goodrich's principal argument here is that no evidence supports the jury finding that the tire was defective because "the tire bore a warning which was unambiguous and conspicuously visible (and not claimed to be inadequate); the tire was safe for use if the warning was

followed; and the cause of the accident was mounting and inflating a tire in direct contravention of those warnings."

We will sustain a no evidence point of error when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *See Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 666 n. 9 (Tex. 1990) (citing Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-363 (1960)).

II

A

This Court has adopted the products liability standard set forth in section 402A of the Restatement (Second) of Torts. *See Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788-89 (Tex. 1967). Section 402A states:

> (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and

> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). A product may be unreasonably dangerous because of a defect in manufacturing, design, or marketing. *See Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 604-05 (Tex. 1972). To prove a design defect, a claimant must establish, among other things, that the defendant could have provided a safer alternative design. *See Caterpillar*, 911 S.W.2d at 384 ("[I]f there are no safer alternatives, a product is not unreasonably dangerous as a matter of law."). Implicit in this holding is that the safer alternative design must be reasonable, *i.e.*, that it can be implemented without destroying the utility of the product. *See id.* (" 'Texas law does not require a manufacturer to destroy the utility of his product in order to make it safe.' ") (quoting *Hagans v. Oliver Mach. Co.*, 576 F.2d 97, 101 (5th Cir. 1978)).[3]

The newly released Restatement (Third) of Torts: Products Liability carries forward this focus on reasonable alternative design. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b). Section 2(b) provides:

> A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other

3. Although not applicable to the present case, the Texas Legislature has recently codified the "reasonably safe alternative" requirement. TEX. CIV. PRAC. & REM. CODE § 82.005 (safer alternative design must be shown by preponderance of the evidence in design defect case).

> distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

To determine whether a reasonable alternative design exists, and if so whether its omission renders the product unreasonably dangerous (or in the words of the new Restatement, not reasonably safe), the finder of fact may weigh various factors bearing on the risk and utility of the product. *See Caterpillar*, 911 S.W.2d at 383-84; *Turner v. General Motors Corp.*, 584 S.W.2d 844, 848 (Tex. 1979).[4] One of these factors is whether the product contains suitable warnings and instructions. *See Turner*, 584 S.W.2d at 847. The new Restatement likewise carries forward this approach:

> A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude and probability of the foreseeable risks of harm, *the instructions and warnings accompanying the product*, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. . . . The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may

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4. While there is language in *Turner* suggesting that whether a safer alternative design exists is merely one of the factors to be weighed by the jury, *see* 584 S.W.2d at 846-47, we made clear in *Caterpillar* that a safer alternative is a prerequisite to a finding of design defect, *see* 911 S.W.2d at 384. Our approach in *Caterpillar* is reflected in the new Restatement.

> also be considered. Thus, the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account. . . .

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (emphasis added).

Goodrich urges this Court to depart from this standard by following certain language from Comment j of the Restatement (Second) of Torts. Comment j provides in part:

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965). The new Restatement, however, expressly rejects the Comment j approach:

> Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not

> be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. *Compare* Comment *e. Warnings are not, however, a substitute for the provision of a reasonably safe design.*

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. l (emphasis added). The Reporters' Notes in the new Restatement refer to Comment j as "unfortunate language" that "has elicited heavy criticism from a host of commentators." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, Reporters' Note, cmt. l (citing Latin, *Good Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L. REV. 1193 (1994) (utilizing the work of cognitive theorists to demonstrate that warnings should only be used as a supplement to a design that already embodies reasonable safety and not as a substitute for it); Twerski, *et al.*, *The Use and Abuse of Warnings in Products Liability: Design Defect Comes of Age*, 61 CORNELL L. REV. 495, 506 (1976)). Similarly, this Court has indicated that the fact that a danger is open and obvious (and thus need not be warned against) does not preclude a finding of product defect when a safer, reasonable alternative design exists. *See Caterpillar*, 911 S.W.2d at 383. ("A number of courts are of the view that obvious risks are not design defects which must be remedied. (citations omitted). However, our Court has held that liability for a design defect may attach even if the defect is apparent.").

The drafters of the new Restatement provide the following illustration for why courts have overwhelmingly rejected Comment j:

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> Jeremy's foot was severed when caught between the blade and compaction chamber of a garbage truck on which he was working. The injury occurred when he lost his balance while jumping on the back step of the garbage truck as it was moving from one stop to the next. The garbage truck, manufactured by XYZ Motor Co., has a warning in large red letters on both the left and right rear panels that reads "DANGER — DO NOT INSERT ANY OBJECT WHILE COMPACTION CHAMBER IS WORKING — KEEP HANDS AND FEET AWAY." The fact that adequate warning was given does not preclude Jeremy from seeking to establish a design defect under Subsection (b). The possibility that an employee might lose his balance and thus encounter the shear point was a risk that a warning could not eliminate and that might require a safety guard. Whether a design defect can be established is governed by Subsection (b).

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. l, illus. 14.[5] In fact, Goodrich recognized at trial that warnings are an imperfect means to remedy a product defect. In response to a question posed by the Martinezes' attorney, Goodrich engineer Stanley Lew answered:

> Q: Is that why designs of a product are more important than warnings on a product because people may not see warnings but they are always going to encounter the design?

---

5. This illustration is based on *Uloth v. City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188 (Mass. 1978).

A: Yes, that's correct. It's the products they deal with.

For these reasons we refuse to adopt the approach of Comment j of the superseded Restatement (Second) of Torts section 402A.

B

We do not hold, as the dissenting justices claim, that "a product is defective whenever it could be more safely designed without substantially impairing its utility," *post* at __, or that "warnings are irrelevant in determining whether a product is reasonably safe." *Post* at __. Rather, as we have explained, we agree with the new Restatement that warnings and safer alternative designs are factors, among others, for the jury to consider in determining whether the product as designed is reasonably safe. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f. While the dissenting justices say that they also agree with the Restatement's approach, they would, at least in this case, remove the balancing process from the jury. Instead, they would hold that Goodrich's warning rendered the tape bead design reasonably safe as a matter of law.

The dissenting justices first argue that Goodrich's warning was clear and that it could have been followed, and consequently Martinez was injured only by "[i]gnoring . . . his own good sense." *Post* at __. Even if this were true,[6] it is precisely because "it is not at all unusual for a person to fail to follow basic warnings and instructions," *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 358 (Tex. 1993), that we have rejected the superseded Comment j. The dissent also notes that there have

6. As discussed in part V of this opinion, we uphold the jury's finding that Martinez was not negligent.

been few reported mismatch accidents involving tires with this particular warning label. While this is certainly relevant, and perhaps would persuade many juries, we cannot say that it conclusively establishes that the tire is reasonably safe when weighed against the other evidence. The jury heard firsthand how an accident can occur despite the warning label, and how a redesigned tire would have prevented that accident. The jury also heard evidence that Goodrich's competitors had incorporated the single strand programmed bead by the early 1980s, and that Goodrich itself adopted this design in 1991, a year after manufacturing the tire that injured Martinez. Under these circumstances, there is at least some evidence supporting the jury's finding of product defect.

III

Goodrich argues that even if its Comment j argument does not prevail, it is still entitled to judgment as a matter of law because no safer alternative was available. In response, the Martinezes point to the evidence that Goodrich's competitors, and eventually Goodrich itself, adopted the safer 0.050" single strand programmed bead. Goodrich counters that this alternative design is not in fact safer because if the tire is matched to the wrong size rim the bead will never seat on the rim and it will inevitably explode during use.

We agree with the general proposition that a manufacturer should not be liable for failing to adopt an alternative design that would, under other circumstances, impose an equal or greater risk of harm. To prevail in a design defect case, a plaintiff should be required to show that the safety benefits from its proposed design are foreseeably greater than the resulting costs, including any diminished usefulness or

diminished safety. *See* Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1690 (1997). As the new Restatement explains:

> When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f.

The Martinezes, however, offered some evidence that their alternative design not only would have prevented the injury to Martinez, but also that it would not have introduced other dangers of equal or greater magnitude. It is undisputed that the single strand programmed bead is more resistant to breaking in mismatch situations. Goodrich expert Tom Conner testified that in a mismatch situation the tape bead may break at 60 psi, while a single strand bead will not break until at least 130 psi. Conner also testified that he has never heard of a single strand bead breaking during the inflating of a mismatched tire. Goodrich representative Stanley Lew testified that the single strand bead is more resistant in a mismatch situation. Lew also testified that if the tire inflated by Martinez had a single strand bead it would not have exploded. Both Conner and Lew testified that they would prefer a tire inflated by their loved one to have a single strand bead.

It is true that Goodrich also offered some evidence that the single strand programmed bead would have introduced other

dangers of equal or greater magnitude because of the risk of "in service" blow-outs. Lew testified that even if a 16" tire was successfully mounted on a 16.5" rim, the tire will fail when used on the road. Conner, a forensic scientist, also stated that both laboratory and road testing revealed that if a 16" tire was mounted on a 16.5" rim the tire will blow out when driven on the road. However, Conner testified that in his 25 years of experience in the tire industry he has never heard of a "single person in the world" that has been hurt by a 16" tire on a 16.5" rim "out in service." Lew testified on direct examination:

> Q: Have you personally seen any examples of where the Goodyear programmed single strand bead used in some but not all of its tires failed in service on the wrong sized wheel?
>
> A: No; I haven't seen any.

Lew further testified:

> Q: Tell me one person's name from any tire you have ever seen where it's failed in service when a 16's mounted on a 16.5.
>
> A: Fine and I told you at my deposition that no; I don't know a single name.
>
> Q: All right. Tell me one single name of a persons [sic] that's been injured in a mismatch explosion of a single strand bead?
>
> A: Again, I don't know of any.

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This evidence does not conclusively prove that the programmed bead would have introduced into the product other dangers of equal or greater magnitude. There was thus a fact issue regarding whether a reasonable alternative design existed, which the jury resolved in favor of the Martinezes.

IV

Goodrich next asserts that the evidence conclusively establishes that the tire rim designed by Ford Motor Company and manufactured by the Budd Company was defective and that such defect contributed to Martinez's injuries, so that the court of appeals erred in affirming the trial court's judgment based on the jury's answers that the rim was not defective and did not contribute to the injury. Goodrich points to Milner's undisputed testimony that the rim was defective because it could have been redesigned to prevent a 16" tire from passing over its flange.

The general rule is that opinion testimony, even when uncontroverted, does not bind the jury unless the subject matter is one for experts alone:

> [T]he judgments and inferences of experts or skilled witnesses, even when uncontroverted, are not conclusive on the jury or trier of fact, unless the subject is one for experts or skilled witnesses alone, where the jury or court cannot properly be assumed to have or be able to form correct opinions of their own based upon evidence as a whole and aided by their own experience and knowledge of the subject of inquiry.

McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986) (citing *Coxson v. Atlanta Life Ins. Co.*, 179 S.W.2d 943, 945 (Tex. 1944)). *See also* TEX. R. CIV. P. 166a(c) (uncontroverted expert testimony may establish right to summary judgment only "as to subject matter concerning which the trier of fact must be guided by the opinion testimony of experts"). Goodrich argues that this subject matter is for experts alone because the jury could not have determined, without the benefit of expert testimony, that a safer, feasible, alternative design existed.

We agree that expert testimony was probably necessary to show the feasibility of the alternative rim design which would have prevented a mismatched tire from passing over the rim flange. Once a feasible alternative design was shown, however, the question remained whether the rim as designed was unreasonably dangerous. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (product is defective in design when risks could have been reduced by adoption of reasonable alternative design *and* omission of the alternative design renders the product not reasonably safe). We conclude that the jury could properly determine whether the rim as designed was unreasonably dangerous, and that it was not required to follow expert testimony on this issue. Milner's expert testimony thus does not conclusively establish that the rim was defective. *Cf. McGalliard*, 722 S.W.2d at 697 (house repairs); *Broussard v. Moon*, 431 S.W.2d 534, 537 (Tex. 1968). (dishwasher repairs); *Coxson*, 179 S.W.2d at 945 (sound health of insured at time policy was issued).

The dissent argues that, even if the jury was not required to accept the *expert* testimony of rim defect, it was required to accept the lay opinion of Martinez and Martinez's co-worker on this issue. Of course, the fact that the dissent places such

weight on this lay testimony supports our conclusion that the subject matter is not solely for experts. Moreover, where the subject matter is not solely for experts, uncontroverted opinion testimony is not conclusive, regardless of whether it comes from an expert or a lay witness. The rule of *McGalliard* quoted above — that expert testimony is generally not conclusive —follows not because the testimony is from an expert, but because it is *opinion* testimony. Unless the subject matter is solely for experts, jurors are capable of forming their own opinions from the record as a whole. *See Coxson*, 179 S.W.2d at 945 (expert testimony is conclusive only where jurors "cannot properly be assumed to have, or be able to form, correct opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry"). Thus, the jury was entitled to reject the opinion testimony that the rim was defective, regardless of whether it was from an expert, Martinez, or Martinez's co-worker.

The dissent also argues that, even without any opinion testimony, the record conclusively establishes that the rim was defective. Milner testified that the rim could have been redesigned to prevent a 16" tire from being mounted on it, possibly by filling the wheel well so that it was not as deep. However, while this is some evidence of a feasible alternative design, it is not conclusive evidence of an unreasonably dangerous product, given the factors that a jury must balance under the Restatement. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f. For example, there was no evidence of whether the alternative design would affect production costs, the rim's road characteristics, or the relative ease of mounting and dismounting the *correct* size tire.

The dissent also argues that the rim is defective as a matter of law because its size was not prominently marked on it. Milner and Conner both testified that the rim's size should be displayed close to the valve stem to reduce the risk of an accidental mismatch. Milner further testified that the size should also be displayed in the wheel well, as some other manufacturers had done. Milner pointed out, however, that "this wheel's probably been cleaned since [the accident] so that the existence of [a size marking] wouldn't necessarily mean that [Martinez] would see it." Indeed, Martinez's co-worker testified that at the time of the accident the wheel was so covered with caliche that "it looked white." Based on this evidence, the jury could have concluded that a size marking near the valve stem would have been obscured, and would not have been seen by Martinez. Similarly, the jury was entitled to conclude that Martinez would not have seen a size marking or warning in the well of the wheel while he was in the process of mounting a tire on the wheel. Thus, even if the dissent were correct that the rim was defective as a matter of law because its size was not clearly marked, the evidence does not conclusively establish that any such defect was a producing cause of Martinez's injury. Because the issues of rim defect and producing causation were both submitted to the jury in one broad-form question, the jury's negative answer to that question is not contrary to the conclusive evidence.

V

Goodrich also argues that the evidence conclusively establishes that Martinez was negligent and that he contributed to his own injuries. Specifically, Goodrich argues that unless some defect in the warning hinders a plaintiff's ability to see and heed it, the failure to see and heed a warning is conclusive proof of contributory negligence.

Appendix A

In reviewing a conclusive evidence point, we must determine whether the proffered evidence as a whole rises to a level that reasonable people could not differ in their conclusions. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994); Powers & Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 523 (1991) ("Ultimately, the test for 'conclusive evidence' . . . is similar to the test for 'no evidence' . . .; the court asks whether reasonable minds could differ about the fact determination to be made by the jury."). The jury was asked to decide whether Martinez was negligent, that is, whether he failed to exercise ordinary prudence. Both Martinez and his co-worker Ramundo Regalado testified that, because they had removed 16" tires from the rims on which they were working, they assumed that the rims were also 16". Also, although there was a tire-changing machine on the premises, the evidence was conflicting as to whether Martinez could have used it to secure the tire. Rene Vera, Martinez and Regalado's employer, testified that the tire-changing machine, although inoperable for dismounting tires, could have nonetheless been used to secure the tire during inflation. Regalado testified, however, that the tire-changing machine did not work, despite his repeated requests to the safety foreman to have it repaired, and that had it worked he and Martinez would have been using it on the day of the accident to secure the tire. Thus, Uniroyal failed to conclusively prove that Martinez was negligent in failing to use the machine. There is no evidence that the other safety devices referenced in the tire warning — a safety cage or an extension hose — were available to Martinez. Further, Goodrich offered no evidence as to whether it was practical or feasible under the circumstances for Martinez to bolt the rim to a vehicle axle in order to inflate the tire and seat the bead. Both Martinez and Regalado testified that the manner in which Martinez was inflating the tire was

customary in their shop. Based upon this evidence, we cannot conclude that reasonable people could not differ about whether Martinez failed to exercise ordinary prudence under the circumstances.

Because we conclude that Goodrich did not conclusively establish that Martinez was negligent, we do not address Goodrich's argument that there is no evidence to support the jury's allocation of causation.

VI

Goodrich next argues that even if it is not entitled to a rendition of judgment, it is entitled to a new trial because of three reversible evidentiary rulings. These rulings were: (1) the admission of evidence of thirty-four other lawsuits against Goodrich involving mismatched tires; (2) the admission of evidence that Goodrich had subsequently redesigned its radial light truck tires to incorporate the single strand programmed bead; and (3) the admission of a "time line" used by the Martinezes' expert. To reverse a judgment based upon erroneously admitted evidence, the complaining party must show that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment or was such that it prevented the complaining party from making a proper presentation of the case to the appellate court. *See Texas Dep't of Human Servs. v. White*, 817 S.W.2d 62, 63 (Tex. 1991); *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989); TEX. R. APP. P. 61.1.

First, as to the other lawsuits, Goodrich asserts that thirty-three of these thirty-four lawsuits involved tires without pictographic warnings. Therefore, they were not substantially

similar and were admitted without proper predicate. Evidence of earlier accidents that occurred under reasonably similar but not necessarily identical circumstances is admissible. *Missouri-Kansas-Texas R. Co. v. May*, 600 S.W.2d 755, 756 (Tex. 1980); *Missouri Pac. R.R. v. Cooper*, 563 S.W.2d 233, 236 (Tex. 1978); *see also Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070 (5th Cir. 1986) (applying Texas law). Like this case, the earlier accidents resulted from mounting a 16" Goodrich tire with a tape bead on a 16.5" rim. The absence of pictographic warnings on the tires does not render the accidents so dissimilar as to preclude their admission, but merely goes to the weight of the evidence. The trial court did not commit error by admitting evidence of the thirty-four earlier accidents caused by mismatching Goodrich tires.[7]

Goodrich next complains that the trial court erred by admitting evidence that Goodrich subsequently redesigned its radial light truck tires to incorporate the single strand

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7. We disagree with the dissenting justices that the trial court admitted evidence of these accidents "with no more predicate than counsel's argument that the claims are similar to the case in which they were offered." *Post* at __. At the pretrial hearing on this issue, the Martinezes' counsel informed the court that Goodrich had identified these accidents in response to an interrogatory asking, "How many people do you acknowledge have been injured as a result of mounting or attempting to mount 16 inch diameter tires manufactured by you on a 16.5 inch diameter rim?" While the interrogatory itself may not be in our record, the Martinezes' counsel read it into the record at the pretrial hearing, and no one disputes its wording or that Goodrich identified the thirty-four accidents in response to it. Thus, the Martinezes established that each of the other accidents involved an injury resulting from mounting a 16" Goodrich tire on a 16.5" rim. Further, it was undisputed that each of the other accidents involved a tape bead like that involved in this accident. Under these circumstances, there was an adequate predicate on which to admit the other accidents.

programmed bead, because radial tires are fundamentally different from the bias-ply tire that injured Martinez, and the bead change was not made in the radial tires for safety reasons. Goodrich first argues that, under these circumstances, the evidence regarding radial tires violates Texas Rule of Civil Evidence 407(a).

Rule 407(a) states:

> Subsequent Remedial Measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. *Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.*

TEX. R. CIV. EVID. 407(a) (emphasis added). Goodrich argues that this rule only permits the admission of subsequent remedial measures involving the product at issue, and that such measures must have been made for safety reasons. However, the rule does not contain these limitations. Rather, under the express language emphasized above, Rule 407(a) simply does not apply in products liability cases based on strict liability. Thus, the trial court did not violate Rule 407(a).[8]

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8. We thus need not address the court of appeals' conclusion that Goodrich failed to properly preserve this complaint. *See* 928 S.W.2d at 74.

Goodrich further argues that, because of the differences between radial tires and bias-ply tires, the evidence regarding the redesign of its radial tires is not relevant to the issue of design defect in its bias-ply tires. Goodrich appears to argue that it was harmed by this evidence because the jury could have improperly inferred that, because Goodrich incorporated the single strand programmed bead into its radial tires, such redesign was feasible and necessary for the bias-ply tire involved in this accident. However, there was independent evidence that the single strand programmed bead *was* feasible for bias-ply tires as early as 1982, when General Tire adopted that design, and that the programmed bead was safer. Under these circumstances, the trial court did not commit reversible error by admitting evidence of Goodrich's redesign of its radial tires.

Raising similar arguments, Goodrich also contends that the trial court erred by admitting evidence of Goodrich's redesign of its "space saver" spare tires. For the reasons discussed above regarding the radial tires, the trial court did not commit reversible error by admitting this evidence.

Goodrich's final evidentiary complaint is that the trial court committed reversible error by admitting a "time line" chart prepared by the Martinezes' expert and used by him during trial. Specifically, Goodrich complains that the time line contained a self-serving compilation of hearsay evidence both irrelevant to the issues in this lawsuit and unfairly prejudicial to Goodrich.

Charts and diagrams that summarize, or perhaps emphasize, testimony are admissible if the underlying information has been admitted into evidence, or is subsequently admitted into

evidence. *See Speier v. Webster College*, 616 S.W.2d 617, 618-19 (Tex. 1981); *Cooper Petroleum Co. v. LaGloria Oil & Gas Co.*, 436 S.W.2d 889, 891 (Tex. 1969); *Champlin Oil & Ref. Co. v. Chastain*, 403 S.W.2d 376, 389 (Tex. 1965). In this case, Goodrich complains that the chart contained highly prejudicial hearsay evidence such as one line reading "numerous 16/16.5 mismatch explosions resulting in serious injury or death." However, all the evidence contained on the chart was already in evidence, principally through Milner's testimony, and Goodrich did not object to its introduction. The trial court did not err by admitting the time line.

VII

Finally, Goodrich complains that the trial court committed reversible error by not bifurcating the liability and punitive damages phases of the trial as required by this Court's subsequent decision in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). The Martinezes argue that consideration of this point is unnecessary because the court of appeals reversed and rendered the jury's punitive damage award, holding there was no evidence to support the verdict on those damages. However, in *Moriel* we instructed trial courts to bifurcate the liability and punitive damages phases of the trial because certain evidence admissible solely for the purpose of proving punitive damages "has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case." *Id.* at 30. Thus, we must determine whether the trial court erred in refusing to bifurcate the punitive damages phase of the trial, and if so, whether the error was harmful.

In *Moriel* we held that "a trial court, if presented with a timely motion, should bifurcate the determination of the amount

of punitive damages from the remaining issues." *Id.* at 30. We stated further that bifurcation applies "to all punitive damages cases tried in the future." *Id.* at 26. Shortly thereafter, in *Ellis County State Bank v. Keever*, 888 S.W.2d 790 (Tex. 1994); we applied *Moriel* retroactively. In *Keever*, we stated that "[a]lthough *Moriel* was decided after the court of appeals' decision in this case, its holding should be applied to a pending case in which a party has preserved the complaint that the court of appeals failed to properly scrutinize a punitive damage award." *Id.* at 799. Since Goodrich presented the trial court with a timely motion, the trial court, consistent with our ruling in *Keever*, should have bifurcated the determination of the amount of punitive damages from the remaining issues.

Having determined that the trial court erred in refusing to bifurcate the trial, we must determine whether the trial court's error was reasonably calculated to cause and probably did cause rendition of an improper judgment. *See* TEX. R. APP. P. 61.1 The rationale given for bifurcation in *Moriel* was that "evidence of a defendant's net worth, which is generally relevant only to the *amount* of punitive damages, by highlighting the relative wealth of a defendant, has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case." *Moriel*, 879 S.W.2d at 30. Here, the jury was not presented with any evidence of Goodrich's net worth. While we do not hold that net worth evidence is the only prejudice that may result from trying actual and punitive damage claims together, there is no prejudice in this case requiring a reversal of the judgment. Goodrich argues that the Martinezes were free to indulge in inflammatory argument for a high punitive damage award that would not have been permitted in the liability phase had bifurcation been granted. Specifically, Goodrich argues that it was severely prejudiced by the Martinezes' plea for $500,000

for each of the thirty-four other lawsuits filed against Goodrich so as to send a "message back to Akron." Because the other suits were properly in evidence on the issue of liability, however, we conclude that this jury argument was not so prejudicial to the actual damages claim as to require a reversal.

* * *

Because we conclude that there is some evidence to support the judgment of the court below on the theory of products liability, we need not consider Goodrich's claim that there is no evidence as to negligence. For the foregoing reasons, we affirm the judgment of the court of appeals.

THOMAS R. PHILLIPS
Chief Justice

OPINION DELIVERED: October 15, 1998

DISSENTING OPINION

JUSTICE HECHT, joined by JUSTICE ENOCH and JUSTICE BAKER, and by JUSTICE OWEN in all but Part II, dissenting.

The Court's revision of its opinion on rehearing requires a responsive revision in this dissent. The dissenting opinion issued July 3, 1998 is accordingly withdrawn, and this opinion substituted.

Having changed about a thousand tires in his life, Roberto Martinez admits he knew better than to lean over a tire while inflating it. Besides, he had seen the pictographic warning on the very tire he was changing which showed a worker being

hurt by an exploding tire and warned: "NEVER stand, lean or reach over the assembly during inflation." Ignoring this warning and his own good sense, Martinez was leaning over the tire, inflating it, when it exploded in his face.

The 16" tire exploded because it would not fit the 16.5" wheel on which Martinez was trying to mount it. Martinez knew it was very dangerous to try to mount a 16" tire on a 16.5" wheel, and he would never knowingly have tried to do it, but the size of the wheel was not marked where he could find it. He understood that his co-worker had taken a 16" tire off the wheel, and he was simply trying to put the same size tire back on. The Budd Company, which manufactured the wheel to Ford Motor Company's specifications, knew, as did Ford, that people sometimes try to mount 16" tires on 16.5" wheels, not realizing that tire and wheel are mismatched. To minimize the risk of such mistakes, Budd and Ford could have changed the design of the wheel to prevent mounting mismatched tires, but they did not do so. Budd could also have simply stamped the size in plain view on the outboard side of the wheel near the valve stem where it was almost sure to be seen, but it did not do that, either. Instead it encoded the size in small letters on the inboard side, where it was hard to find if the wheel was clean, and indecipherable if the wheel was dirty, as it was in this case.

Although a 16.5" wheel can be designed so that a 16" tire cannot be mounted on it, a 16" tire cannot be designed so that it cannot be mounted on a 16.5" wheel. A tire manufacturer's only options to reduce the risk of injury from attempting to mount a 16" tire on a 16.5" wheel are to place a warning on the tire or to design the bead wire so that it will withstand higher inflation pressure before exploding. The Uniroyal Goodrich Tire Company, which made the tire Martinez was using, chose to

put a prominent, pictographic label on it, which, as I have said, Martinez actually saw but did not heed. Had he done so, he would not have been injured. In fact, according to the record, only one other person has ever claimed to have been injured attempting to mount a 16" tire with a warning label like Goodrich's on a 16.5" wheel, although thousands of labeled tires and more than thirty million 16.5" wheels have been manufactured in the past two decades.

Now as among Martinez, the wheel manufacturers, and Goodrich, how should responsibility for Martinez's accident be apportioned? The reader may be surprised at the answer in this case. Martinez, though negligent by his own admission, is held to bear no responsibility for the accident. The wheel manufacturers, too, are held to be free of responsibility (they settled with Martinez before trial) although the undisputed testimony by both Martinez's and Goodrich's experts is that Budd and Ford defectively designed the wheel. Only Goodrich is held liable — and for providing a warning on the tire that would have prevented Martinez's accident altogether instead of redesigning the bead wire so that the accident would only have been less likely. This aberrant result flows from four serious flaws in the Court's opinion which, even more importantly, misstate the law that will be applied in other cases.

First, the Court holds that a product can be found to be defective whenever it could be more safely designed without substantially impairing its utility. This is not, and should not be, the law. As the *Restatement (Third) of Torts: Products Liability* advises, a "broad range of factors" besides the utility of a reasonable alternate design should be considered in determining whether its use is necessary to keep the product reasonably safe, including "the magnitude and probability of

the foreseeable risks of harm [and] the instructions and warnings accompanying the product".[1] When the undisputed evidence is that the magnitude and probability of a risk are low, an alternative design could reduce but not eliminate that risk, and the instructions and warnings given do eliminate the risk, the product should be determined not to be defective as a matter of law.

Second, the Court holds that whether a wheel is defectively designed "because its size is not clearly marked or because its design allows a mismatched tire to be placed on it" can be decided by "lay jurors, based on their own experience and common sense," unaided by expert opinion.[2] It follows that a plaintiff, by offering no evidence other than his own lay opinion, could prove that a wheel was defectively designed — that is, that risks of harm were foreseeable, that there was a reasonable alternative design that would reduce and avoid them, and that the omission of the design rendered the product not reasonably safe. I doubt whether such lay testimony would support a judgment in any design defect case.[3] The record in this case proves that such evidence could not possibly support a judgment for Martinez.

Third, the Court holds that evidence of thirty-four other claims of injury over fifteen years from trying to mount 16"

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1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. f, at 23 (1998).

2. *Ante* at __.

3. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (suggesting that expert testimony would be required in design defect cases).

Appendix A

Goodrich tires on 16.5" wheels was admissible without proof that any of the claims were valid — some were undisputedly invalid — or that they arose out of accidents similar to Martinez's. A few weeks ago the Court held that evidence of anticipated or unpaid punitive damage claims is irrelevant and inadmissible to show punitive damage liability.[4] Today the Court holds that evidence of other claims — whether proven or not, and whether similar or not — is relevant and admissible to show liability. The Court also holds that an expert may testify that a product has caused serious injury and death when no basis at all has been shown for the statement.

Fourth, the Court holds that the district court's refusal to bifurcate the punitive damages part of the trial was harmless error because Martinez did not offer evidence of Goodrich's net worth. But while net worth evidence can unfairly prejudice the jury's consideration of liability issues, it is not the sole source of prejudice. Today's opinion undermines the bifurcation requirement of *Transportation Insurance Co. v. Moriel*.[5]

Because I disagree with all these holdings, for reasons I now explain in more detail, I respectfully dissent.

I

Comment j to Section 402A of the *Restatement (Second) of Torts* states:

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4. *Owens-Corning Fiberglas Corp. v. Malone*, __ S.W.2d __, __ (Tex. 1998).

5. 879 S.W.2d 10 (Tex. 1994).

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.[6]

We have followed the first clause of comment j, but only to the extent of holding that a plaintiff is entitled to a rebuttable presumption that had he been adequately warned of the dangers of a product, he would have avoided injury, despite the fact that experience teaches that "it is not at all unusual for a person to fail to follow basic warnings and instructions."[7] The presumption is merely a procedural device to obviate the necessity of plaintiff's self-serving testimony that he would have heeded adequate warnings.[8] In making the presumption rebuttable we recognized that the first clause is not always true. Further, we have never followed the second clause of comment j, and now the *Restatement (Third) of Torts: Products Liability* has withdrawn comment j altogether as "unfortunate language" that "has elicited heavy criticism from a host of commentators."[9] The Court's firm rejection of comment j, which the Court has never adopted and the *Restatement* has now itself rejected, is

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6. RESTATEMENT (SECOND) OF TORTS: PRODUCTS LIABILITY § 402A, cmt. j, at 353 (1965).

7. *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 358 (Tex. 1993); *see Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 834 (Tex. 1986); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972).

8. *Saenz*, 873 S.W.2d at 359.

9. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, Reporters' Note, cmt. l, at 101 (1998).

perhaps beating a dead horse, but I agree that comment j does not correctly state what the law is or should be.

Since it is human nature to disregard instructions, a rule that any product is reasonably safe as long as it bears an adequate warning of the risks of its use is not feasible. Such behavior, however, does not warrant the opposite rule that warnings are irrelevant in determining whether a product is reasonably safe. I agree with the Court that comment l to Section 2 of the *Restatement (Third) of Torts: Products Liability* now has it about right:

> Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. Warnings are not, however, a substitute for the provision of a reasonably safe design.[10]

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10. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. l, at 33 (1998) (citation omitted).

I do not agree, however, that the Court correctly reads or follows comment l. Comment l limits but does not foreclose the role of warnings in making products reasonably safe, even when there is a safer alternative design. The Court stresses the last sentence of comment l and brushes past the first sentence. Taken as a whole, the comment says, correctly, I think, that a safer alternative design that eliminates a risk is required over a warning that leaves a significant residuum of risk because product users may not get the warning, may be inattentive, or may not be motivated to heed the warning. The illustration accompanying comment l is of a worker whose foot is severed by a garbage truck's blade and compaction chamber when he loses his balance jumping onto the back of the truck.[11] A warning on the truck, "keep hands and feet away", does little to protect against a worker's foreseeable inadvertence or misstep in the usual discharge of his job. But the warning might well be adequate admonishment to the merely curious, even if the garbage truck could be designed to be safer, if the residuum of risk were insignificant. Even if the risk that a worker will lose his balance and slip is significant enough to warrant designing additional protections in the truck, the risk that someone will intentionally stick his hand in a place where it obviously may be hurt when he is effectively warned not to do so may not warrant design changes.

Section 2(b) of the *Restatement (Third) of Torts: Products Liability* states the applicable rule:

> A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other

11. *Id.*, illus. 14, at 33.

> distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.[12]

There are two components to this rule: the possibility of a safer, reasonable alternative design, *and* a product that is not reasonably safe without that design. Both are required. Even if a reasonable alternative design would make a product safer, the product is not defective unless the omission of the design makes the product not reasonably safe. The comparison is not between the two designs, but between the product alternatively designed and the product including any warning. Comment f to Section 2 explains:

> Subsection (b) states that a product is defective in design if the omission of a reasonable alternative design renders the product not reasonably safe. A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered.[13]

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12. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b), at 14 (1998) (emphasis added).

13. *Id.* § 2, cmt. f, at 23 (citation omitted).

Appendix A

The Reporters' Note gives an example of how factors other than a safer alternative design affect the determination whether a product is defective:

> Comment *f* lists among the factors a court may consider in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe the following: (1) magnitude and probability of the foreseeable risks of harm; (2) the instructions and warnings accompanying the product; and (3) the nature and strength of consumer expectations. A recent California case is in agreement. In Hansen v. Sunnyside Products, Inc., 55 Cal. App. 4th 1497 (1997), the court held that in a claim alleging defective design of a household cleaner containing hydrofluoric acid, the availability of an alternative safer design was not dispositive of liability. The factfinder could consider the warnings on the bottle describing the danger of exposing a user's skin to the cleaner in risk-utility balancing to decide whether the product was unreasonably dangerous.[14]

Hansen explained its rationale as follows:

> We do not think that the risk to the consumer of the design of many household products can be rationally evaluated without considering the product's warnings. Thus, for example, what is the risk of the design of a power saw, or other power tools or equipment, without considering the product's directions and warnings? We dare say that the risk

14. *Id.* § 2, Reporters' Note, cmt. f, at 94.

> would be astronomically, and irrationally, high. The same could be said about common garden pesticides, or even the household microwave oven. In our view, were we to ask jurors to evaluate the risks of the design of many household products without considering their directions or warnings, the practical result would be the withdrawal from the market of many useful products that are dangerous in the abstract but safe when used as directed.[15]

Another example the *Hansen* court might have picked is aerosol cans. Such cans are not defective merely because they could be redesigned so as not to explode if punctured or incinerated. A warning against such misuse ought to be sufficient.

The Court protests that it has not disregarded the effect of warnings in determining whether the possibility of a safer alternative design makes a product defective but has merely left the matter to the jury. But the question remains: can any product be shown not to be defective as a matter of law if a reasonable alternative design could have avoided plaintiff's injury? The Court suggests no such possibility. The *Restatement* appears to contemplate that a product is not defective as a matter of law if the safer design does not eliminate the risks, or if the warning on the product does not leave a significant residuum of risk, as when "users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings."[16]

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15. *Hansen v. Sunnyside Prods., Inc.*, 65 Cal. Rptr. 2d 266, 278 (Ct. App. 1997).

16. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. l, at 33 (1998).

The present case illustrates this rule. Concededly, the evidence favorable to Martinez shows that the Goodrich tire's bead wire can be redesigned, mostly to increase its strength, without significantly reducing the tire's utility or increasing the danger of blowouts at highway speeds. Such an alternative design is thus reasonable and safer. But it only reduces — it does not eliminate — the risk that a tire being mounted on a mismatched wheel will explode. The undisputed evidence in this case is that a 16" tire cannot be mounted on a 16.5" wheel, and that if the tire continues to be inflated in an effort to force it to seat on the wheel rim, it will explode. Redesigning the bead wire only means that the tire will withstand higher inflation pressure before exploding. Although there was evidence that the alternate design would prevent the tire from exploding at ordinary mounting pressures, nothing about the design precludes the person mounting the tire from continuing to increase the pressure in an effort to force it to seat on the rim. Because the risk of explosion cannot be eliminated, omission of the alternative design may not make the tire not reasonably safe under comment l of the *Restatement*.

Nor was Goodrich's warning ineffective, another factor under comment l. Goodrich's warning label showed a picture of a person being injured by an exploding tire and stated in bright colors:

DANGER

NEVER MOUNT A 16" SIZE DIAMETER TIRE ON A 16.5" RIM.

Mounting a 16" tire on a 16.5" rim can cause severe injury or death. While it is possible to pass a 16"

> diameter tire over the lip or flange of a 16.5" size diameter rim, it cannot position itself against the rim flange. If an attempt is made to seat the bead by inflating the tire, the tire bead will break with explosive force.
>
> . . .
>
> NEVER inflate a tire which is lying on the floor or other flat surface. Always use a tire mounting machine with a hold-down device or safety cage or bolt to vehicle axle.
>
> NEVER inflate to seat beads without using an extension hose with gauge and clip-on chuck.
>
> NEVER stand, lean or reach over the assembly during inflation.
>
> . . .
>
> Failure to comply with these safety precautions can cause the bead to break and the assembly to burst with sufficient force to cause serious injury or death.

Martinez does not question the adequacy of the warning. It cautions not only against mismatching tires and wheels but against inflating tires in certain ways under *any* circumstances. The record in this case does not show that a warning against mismatching tires and wheels will not reach users. On the contrary, Martinez testified that he saw the warning on the tire, and anyway, he knew that it would be very dangerous to try to mount a 16" tire on a 16.5" wheel. As Martinez put it, "common

sense also tells you that where you have a mismatch you can get injured." Martinez was not inattentive, as the garbage truck worker who lost his balance. He knew better than to lean over a tire — any tire — while inflating it. None of the reasons in comment l that warnings may be ineffective apply in this case.

Nor were the warnings impractical. Despite the fact that Martinez was not provided with any of the safety devices prescribed in the warning — a workable tire mounting machine, a cage, or an extension hose with gauge and clip-on chuck — and may not have been able to bolt the wheel back on the trailer from which it had been removed before mounting the tire, he could have avoided injury by simply not leaning over the tire while inflating it. Martinez testified as follows:

> Q Now, I believe you have also testified, Roberto, that while you are inflating a tire you would not want to be leaning over the tire as you inflate it.
>
> A No.
>
> Q And by that I mean when you are airing it up during the mounting process you would want to lean away from it; would you not?
>
> A Well, just don't get over it, you know, just be right beside it.
>
> Q Why would you not want to be leaning over it?
>
> A Because that's the way I was caught.

> Q Okay. Do you feel it would be a safety consideration, to be safer to not be over the tire —
>
> A Yes.
>
> Q — while you're inflating it?
>
> A Yes.

The inboard side of the tire, next to the ground, exploded. Martinez was injured when the wheel struck his head. The wheel also struck the roof of the shop overhead and dented it. Clearly, had Martinez not been leaning over the wheel, as he knew not to do and as the tire label warned against, the tire would not have struck his head.

Given the ease with which injury can be avoided, there is no evidence that redesigning the bead wire will eliminate a "significant residuum of risk" in the tire as designed with the warning label. In fact, Martinez's own evidence is to the contrary. The record establishes that there has been only one other claimed injury caused by attempting to mount a 16" tire with a warning label on a 16.5" wheel. The record does not reflect whether that claim was ever proved. Thousands of 16" tires have been manufactured with warning labels; millions of 16.5" wheels have been manufactured without warning labels. Martinez's evidence (which should not have been admitted) shows thirty-four claims against Goodrich for injuries caused by mismatching unlabeled 16" tires on 16.5" wheels. There has been one other claim involving a labeled tire. The tire industry should not be compelled to redesign bead wires to make tires harder to explode — or pay damages for failing to do so — simply because one or perhaps two mechanics over the years failed to follow directions or their own good sense.

> From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices.[17]

Thus, under comment l, there is no evidence that omission of the safer bead wire design made Goodrich's tire not reasonably safe. The risk of explosion could not be eliminated, the warning was clear, effective, and easy to follow, and thus no significant residuum of risk remained in the tire as designed with the warning label attached. In the Court's view, a product manufacturer may be liable for failing to make any feasible design change that does not significantly impair a product's utility, if only to prevent rare mishaps from conscious disregard of adequate warnings. That is all the evidence in this case shows. The Court appropriately rejects one extreme position — comment j to Section 402A of the *Restatement (Second) of Torts* — but then adopts the opposite and equally extreme position. In so doing, the Court swings toward strict liability.

II

The evidence is undisputed that the wheel was defectively designed, and that the defect helped cause the accident. Martinez's expert testified:

> Q And in your opinion the Budd wheel, Exhibit 2, is defective.

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17. *Id.* § 2, cmt. a, at 16.

A Yes, sir.

Q And it was a cause of the accident.

A Yes, one of the causes.

Martinez's expert explained that a 16.5" wheel can be designed to prevent mounting a 16" tire, but that the tire cannot be designed to prevent attempts to mount it on the wheel. Moreover, the expert explained that stamping the size on the wheel in plain sight, as some wheel manufacturers do, would reduce the risk of mismatching. Martinez acknowledged that it "makes sense" that the size of the wheel be stamped on the outboard side near the valve stem where it can easily be seen. Martinez's co-worker also testified:

> Q If when you were working with this wheel you had seen the number 16.5 you wouldn't have proceeded, would you?
>
> A No, sir.
>
> Q You knew based on your experience that you do not mix different sizes?
>
> A No.
>
> Q That's something every mechanic knows?
>
> A Yes, sir.
>
> Q If the wheel that you were working on had the warning . . . , "To avoid personal injury during mounting of tire to wheel mount only 16.5 inch diameter tire," you would not have proceeded

> because that would have told you that the wheel really was 16.5?
>
> A Yes, sir.

The undisputed evidence is that Budd and Ford did not design their wheel to prevent 16" tires from being mounted on it, and did not stamp the size where it could be seen. Rather, the size was included in a string of numbers stamped on the inboard side of the tire that were hard to find and harder to decipher. The wheel Martinez was working on was so covered by caliche that it would have been virtually impossible to find the tire size.

Goodrich argues that the evidence conclusively establishes that the wheel rim was defectively designed and that the defective design was a cause of Martinez's injuries. The Court rejects this argument, using the rule that "opinion testimony, even when uncontroverted, does not bind the jury unless the subject matter is one for experts alone".[18] The Court concedes that "expert testimony was probably necessary to show the feasibility of the alternative rim design which would have prevented a mismatched tire from passing over the rim flange."[19] Thus, in the Court's view, with which I agree, the evidence establishes one component of defective design — the possibility of a safer, reasonable alternative rim design.[20] The second component — that the rim was not reasonably safe without the

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18. *Ante* at __.

19. *Ante* at __.

20. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(B), at 14 (1998).

alternative design[21] — is not in this context, according to the Court, a matter for experts alone. Thus, the Court concludes, the evidence does not conclusively establish that the wheel rim was defectively designed. But the Court's conclusion does not follow from its premise. That is, even if the jury was free to disregard expert testimony that the wheel rim was unreasonably dangerous as designed, including the testimony on Martinez's own expert, *because the subject was not one for experts alone*, the matter may nevertheless be conclusively established by the evidence.

As a general rule, the testimony of a party or a witness who has an interest in the outcome of a suit cannot conclusively establish a matter but raises an issue of credibility on which the jury must pass.[22] But there are exceptions. Even summary judgment can be granted on "uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."[23] As we explained in *Collora v. Navarro*:

> First, the general rule governing the finality to be given to testimony of an interested witness is by no means an absolute one to be applied in a cut-and-dried fashion. Rather, it is flexible and its application must turn on the facts of each case. Certainly there will be cases where the credibility of an interested witness or party is so suspect that it

21. *See id.*

22. *Collora v. Navarro*, 574 S.W.2d 65, 69 (Tex. 1978).

23. TEX. R. CIV. P. 166a(c).

> must go to the jury, even though the testimony is uncontradicted. Then there will also be cases where the testimony of the witness is so clear that the jury should not be allowed to speculate as to his veracity. Between these two extremes lies a broad spectrum of possibilities. Our courts have recognized this in the past by setting forth certain standards by which the rule and its exceptions are to be measured: Is the testimony clear, direct, and positive? Is it internally consistent? Is it contradicted or corroborated by other witnesses? Does the opposing party possess the means to verify or dispute the testimony? Does he have a way to test the witness' credibility? Obviously no one factor automatically can be dispositive in every case.[24]

Collora was a suit for partition of real property in which plaintiff claimed an interest as defendant's common law wife. Plaintiff testified that she and the defendant had agreed to be husband and wife — one of the elements of a common law marriage — and the evidence conclusively established the other elements. Defendant did not testify or offer evidence in rebuttal. The trial court directed a verdict for the plaintiff, based on her uncontradicted testimony. The court of civil appeals reversed, holding that the plaintiff's testimony did not conclusively establish the existence of an agreement to be husband and wife because the jury could have chosen not to believe her, and thus reasonable minds could differ over the conclusions to be drawn from her testimony.[25] This Court reversed the court of civil appeals, holding that the directed verdict was proper.

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24. *Id.*

25. *Navarro v. Collora*, 566 S.W.2d 304 (Tex. Civ. App. — Corpus Christi), *rev'd*, 574 S.W.2d 65 (Tex. 1978).

Appendix A

The testimony of Martinez and his co-worker, as well as Martinez's expert witness, that the wheel rim was unreasonably dangerous was contrary to Martinez's interest in the case. It was to Martinez's benefit that the percentage responsibility for causing his injuries assigned to the wheel manufacturers be as low as possible, since he had already settled with them. Testimony that the wheel rim was defectively designed undercut Martinez's position that Goodrich alone was responsible. Because there was nothing to cast suspicion on Martinez's testimony or that of his co-worker and his expert witness concerning whether the wheel rim was unreasonably dangerous as designed, the jury was bound by that testimony. Their testimony, contrary to Martinez's interest, was more like testimony by a disinterested witness. Professors William Powers, Jr. and Jack Ratliff have explained the considerations for determining whether a disinterested witness's testimony is binding on the jury:

> Must the jury accept [the uncontradicted testimony by a disinterested witness]? That is, does such testimony, if uncontradicted, [conclusively establish a fact]? The prevailing and better view is that the reasonable minds test should apply here. If there is nothing to cast suspicion on the testimony — that is, if reasonable minds could not differ — then the jury must accept it. But, if the testimony is impeached, inconsistent, or otherwise suspect (even though not directly controverted) — that is, if reasonable minds might or might not accept it — then the jury may reject it. McDonald aptly observes that disinterested testimony is, in fact, treated much the same as interested testimony, except that courts are more inclined in the case of interested testimony

to find suspicious circumstances that would allow the jury to reject it.[26]

Even without the testimony of Martinez, his co-worker, and his expert, the record establishes that the wheel rim was defectively designed. As already noted, the factors to be considered in determining whether a product is unreasonably dangerous include the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, the nature and strength of consumer expectations regarding the product, and the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed.[27] Concerning these factors: the risk of injury from mismounting a tire was the same for the defectively designed wheel rim as for the defectively designed tire; the wheel bore no warnings, as the tire did; consumer expectations were no different for the wheel than for the tire; and there was no evidence that the wheel rim design was advantageous or the alternate design disadvantageous. In sum, the evidence established that the tire was less dangerous than the wheel rim, because the tire at least had a warning label and the wheel had none.

The Court states that Martinez's expert's testimony that the wheel was defective was not evidence that it was unreasonably dangerous. But the expert was directed by

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26. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 524 (1991) (citing 3 R. MCDONALD, TEXAS CIVIL PRACTICE § 11.28.6, at 209 (1984)). *See* 4 MCDONALD TEXAS CIVIL PRACTICE § 21.58, at 149-151 (1992).

27. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b), cmt. f, at 23 (1998) (emphasis added).

Martinez's counsel to assume that "defect is defined by the Court as being unreasonably dangerous." The Court states that the expert's opinion was not conclusive, given the factors the jury was to balance. But the only factors the jury was instructed in the charge to consider were "the utility of the product and the risk involved in its use." Moreover, Martinez's expert testified that the defect in the wheel could have been remedied simply and without difficulty. Specifically, the expert testified as follows:

> Q From the moment it came on the market the 16-½-inch rim could have been changed so that you couldn't get the wrong sized tire on it.
>
> A I believe it could, yes.
>
> Q The same thing is not true for the 16-inch tire. There is no way to design or alter the 16-inch tire so that somebody by mistake doesn't try to put it on a 16-½-inch wheel. That is true; isn't it?
>
> A I don't know of a way to do it, no. I have not seen a way to do that.
>
> Q In your view, if the wheel companies were going to come out with a new 16-½-inch size which actually looks somewhat smaller than the 16 they should have designed that new wheel in such a fashion that it looked very different from the old 16; isn't that correct?
>
> A I would certainly recommend that, yes.

Q In your opinion, that could have been done.

A I think it could, yes.

Q That would not have been difficult to do.

A No; I can see where one could do it.

Q And it is further your opinion that once it occurred to the wheel companies that they had done something that was, in fact, causing a substantial problem, they then could have taken what they had and altered its configuration so that you couldn't get the wrong sized tire on it.

A In subsequent productions they could, yes.

Q And that could have been done by something as simple as filling in the well so that it wasn't quite so deep; is that a fair statement?

A That's one way to do it. There may be other ways to do it as well, but that's one way to do it.

Q Well, the one way that I just mentioned is one that you have specifically advocated yourself.

A I have done that myself, yes.

Q You not only did it, but you wrote a paper on it.

A Yes, sir.

The Court also states that the jury was free to speculate that marking the wheel size on the wheel itself might not have prevented Martinez's injury because the marking might have been covered by caliche or not seen by Martinez. But Martinez's expert's testified that if the size had been stamped in the drop center or the well of the wheel, it could not have been obscured. Specifically, the expert testified as follows:

> Q Well, the language here where it says, quote, use only 16.5 tires, that was stamped on Kelsey-Hayes wheels starting at about 1980.
>
> A Yes.
>
> Q Exactly where you wanted it to be, near the valve hole.
>
> A Well, I think, I think you are quoting me a little out of context. I said it wouldn't be a good idea, it would be a good idea for that to be there. But the best place for it is in the drop center where there is more room for it and where it is not obstructed by dirt and paints.
>
> * * *
>
> Q Okay. Let's be sure that we understand that in plain and simple English. It means, one, that in 1980 General Motors directed its supplier Kelsey-Hayes to stamp something near the valve hole and to place this warning in the well of every wheel it made after that.

A That is right.

Q And Ford never directed Budd to do anything until Budd stopped making the wheel in 1983.

A That's my recollection, yes.

Had the wheel size been stamped or labeled in the drop center or well of the wheel, it could not have been obscured, no matter how dirty the wheel became, and Martinez could not have missed it.

The evidence, including the testimony of Martinez's own expert, conclusively established that the wheel manufacturers bore some responsibility for Martinez's injuries. Since the evidence did not establish the precise percentage of responsibility attributable to the wheel manufacturers, Goodrich is entitled only to a new trial.

III

Martinez offered, and the district court admitted in evidence, a list of thirty-four lawsuits against Goodrich involving claims for injuries suffered in attempting to mount 16" Goodrich tires on 16.5" wheels. Goodrich complains that Martinez never laid a predicate for admitting this evidence, showing the similarity of the other lawsuits to this one. The Court dismisses Goodrich's complaint in a sentence: "The absence of pictographic warnings on the tires does not render the accidents so dissimilar as to preclude their admission, but merely goes to the weight of the evidence."[28]

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28. *Ante* at __.

The Court has not met the substance of Goodrich's argument. First, Goodrich argues that Martinez laid no predicate whatever for admission of the evidence. Martinez does not, and cannot, dispute this. The district court admitted the list of lawsuits based solely on the statement of Martinez's counsel that the information had been produced by Goodrich in answer to an interrogatory in discovery. The interrogatory and answer were never offered in evidence (and are not in our record), nor was there any other proof to show the nature of the cases listed. A plaintiff who offers evidence of other accidents is "required to show that the earlier accidents occurred under reasonably similar but not necessarily identical circumstances."[29] Martinez made no showing whatever. Thus, the Court holds that evidence of other claims may be admitted with no more predicate than counsel's argument that the claims are similar to the case in which they are offered. This, of course, eviscerates any meaningful evidentiary standard.

Second, although Goodrich argued that the presence or absence of pictographic labels was a significant difference in claims of injury due to mismatch tires, that was not the only difference Goodrich claimed was significant. Other differences in the cases, according to Goodrich's counsel, were how experienced the injured person was in changing tires, what safety equipment was available, what kind of tire was involved and whether it was radial or bias ply, and what the result was in the case. At least two of the cases were dismissed against Goodrich. The burden was not on Goodrich to show that the other cases were different; the burden was on Martinez to show

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29. *Missouri Pac. R.R. Co. v. Cooper*, 563 S.W.2d 233, 236 (Tex. 1978) (citing *Karr v. Panhandle & Santa Fe Ry. Co.* 262 S.W.2d 925, 928, 932 (Tex. 1953), and *Dallas Ry. & Terminal Co. v. Farnsworth*, 227 S.W.2d 1017, 1020 (1950)).

that they were similar.[30] Nevertheless, Goodrich pointed out important differences to the court.

Third, the presence of pictographic labels may have been a significant distinction in the cases. Of the thirty-four on the list Martinez offered, only two involved pictographic labels. It may be that fewer accidents involved labeled tires because the labels were effective, or because fewer tires were manufactured with labels, or because labels had been used for only a short time, or perhaps for other reasons. Such arguments would go merely to the weight to be given the evidence, not its admissibility. But without any predicate at all offered by Martinez, it is impossible to say that the presence of the label was not significant.

Finally, admission of the list was extremely prejudicial to Goodrich. Martinez's counsel told the court before trial that "[i]n all these cases we keep talking about . . . they keep killing and injuring people". Martinez's counsel asked his own expert witness: "And some tire companies it only takes twenty-nine or thirty people to get killed or injured before they come to the conclusion that maybe they ought to change their bead." Martinez's counsel asked Goodrich's expert: "So how many people have you all killed?" Without any predicate whatever, Martinez's counsel was permitted to use the list of lawsuits to insinuate repeatedly that others had been injured or killed in circumstances similar to those in this case. This was plainly error.

The lawsuit list was not the only exhibit erroneously admitted. The district court also admitted a chart sponsored by

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30. *Id.*

Martinez's expert witness showing the history of changes in bead wire design. The Court's conclusion that "all the evidence contained on the chart was already in evidence"[31] is simply false. There is absolutely no evidence of the very prejudicial reference on this time-line to "numerous 16/16.5 mismatch explosions resulting in serious injury or death." It should go without saying that a party should not be permitted to assert repeatedly that an opponent's product has killed and injured people without proof that it is actually so.

Only a few weeks ago the Court held in *Owens-Corning Fiberglas Corp. v. Malone* that evidence of anticipated or unpaid punitive damage claims is irrelevant and therefore inadmissible to show punitive damage liability.[32] If anticipated or unpaid punitive damage claims are not probative of punitive damage liability absent evidence of whether such claims have succeeded, I fail to see how actual damage claims are probative of liability for actual damages absent the same evidence. Today's holding that evidence of other claims — whether proven or not, and whether similar or not — is relevant and admissible to show liability directly conflicts with our decision in *Owens-Corning* and essentially destroys any standard for admitting evidence of other claims.

IV

The Court holds that the district court erred in denying Goodrich's motion to bifurcate the actual and punitive damages phases of the trial, but that the error was harmless because

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31. *Ante* at __.

32. __ S.W.2d __, __ (Tex. 1998).

Martinez offered no evidence of Goodrich's net worth and the evidence of other lawsuits against Goodrich was properly admitted. I have already shown that the list of lawsuits should not have been admitted without a predicate showing of similarity between each of the lawsuits and this case. But even if the list of other lawsuits was properly admitted, it alone required a bifurcation of the actual and punitive damage claims.

As the Court notes, "[i]n [*Transportation Insurance Co. v.*] *Moriel* we held that 'a trial court, if presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues."[33] Although we reasoned in *Moriel* that evidence of a defendant's net worth offered on a punitive damage claim could unfairly prejudice a defendant on plaintiff's claim for actual damages, we did not suggest that net worth evidence was the only prejudice in trying actual and punitive damage claims together. In the present case, Martinez's counsel's repeated references to other claims against Goodrich were plainly intended to insinuate that if others had been injured trying to mount Goodrich's 16" tires on 16.5" wheels, the tire was defective, and the defect caused Martinez's injuries. The list of other lawsuits, even if properly admitted, unfairly prejudiced Goodrich on Martinez's liability claim as much as evidence of its net worth would have.

The district court refused Goodrich's motion to bifurcate the trial before evidence was offered and without regard to whether Martinez would offer evidence of net worth. The record shows that the district court refused to follow *Moriel* because Martinez did not want a bifurcated trial. The court's error clearly prejudiced Goodrich.

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33. *Ante* at __ (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994)).

Appendix A

* * * * *

The record in this case shows that Goodrich's tire including the warning label was not defectively designed as a matter of law. Even if that were not so, Goodrich is entitled to have its liability determined in a fair trial in which at least some responsibility for the accident is assigned to Martinez and the wheel manufacturers, evidence of other claims against Goodrich is excluded until a proper predicate is laid for its admission, and punitive damages are tried separately as required by *Moriel*. Because the Court denies Goodrich any relief, I respectfully dissent.

NATHAN L. HECHT
Justice

OPINION DELIVERED: October 15, 1998

APPENDIX B — OPINION OF THE COURT OF APPEALS OF TEXAS, SAN ANTONIO DATED OCTOBER 4, 1995 AND REHEARING OVERRULED NOVEMBER 3, 1995

UNIROYAL GOODRICH TIRE COMPANY, Appellant,

v.

Roberto O. MARTINEZ and Juanita Martinez, Individually and As Next Friends of Robert Martinez, Jr. and John Mathew Martinez, Minors, and Mary Willis, Appellees.

No. 04-93-00526-CV.

Court of Appeals of Texas,
San Antonio.

Oct. 4, 1995.

Rehearing Overruled Nov. 1, 1995.

* * *

Before RICKHOFF, LOPEZ and GREEN, JJ.

OPINION

LOPEZ, Justice.

Uniroyal Goodrich Tire Company (Goodrich) appeals a jury verdict for Roberto Martinez (Martinez) and his wife, Juanita Martinez, individually and as next friends of Robert, Jr. and John Martinez. We affirm in part and reverse in part.

Appendix B

Martinez suffered severe injuries on October 31, 1990 when he was struck by a 16" Goodrich tire that exploded after he had mounted it on a 16.5" rim during the course of his employment. Martinez brought suit against Goodrich as manufacturer of the tire, The Budd Company (Budd), manufacturer of the rim, and Ford Motor Company (Ford), who designed the specifications for the rim. Three theories were alleged in Martinez's petition: (1) strict products liability based on defective design, (2) negligence, and (3) gross negligence. Budd and Ford settled prior to trial. The jury found that (1) the design defect in the Goodrich tire was a producing cause of Martinez's injuries; (2) the rim was not defective as designed by either Ford or Budd; (3) Goodrich's negligence and gross negligence proximately caused Martinez's injuries; and (4) neither Martinez, Budd, nor Ford was negligent. The jury awarded Martinez and his family $5.5 million in actual damages plus $11.5 million in punitive damages. The punitive damages were reduced to one times the actual damages pursuant to a pretrial agreement between the parties. The trial court further reduced the total damages by $1.4 million in accordance with Goodrich's elected dollar for dollar settlement credit. The court also awarded prejudgment interest. Goodrich brings twenty-one points of error on appeal.

Several of Appellant's points of error challenge both the legal and factual sufficiency of the evidence. In considering a "no evidence" or legal sufficiency point of error, we consider only the evidence favorable to the verdict and disregard all evidence and inferences to the contrary. *Davis v. City of San Antonio,* 752 S.W.2d 518, 522 (Tex.1988). When more than a scintilla of evidence supports the jury's finding, we are not at liberty to sustain a no evidence point. *Kindred v. Con/Chem, Inc.,* 650 S.W.2d 61, 63 (Tex.1983). When considering a factual

sufficiency point, however, we review all of the evidence and sustain the point of error only if the supporting evidence is so weak as to be clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986).

1. Negligence

In its first point of error, Appellant contends that there was no evidence or insufficient evidence that Goodrich was negligent. Negligence consists of three essential elements: (1) a legal duty owed by one person to another; (2) breach of that duty; and (3) damages proximately resulting from that breach. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex.1987). A manufacturer has a duty to exercise reasonable care in designing and manufacturing a product. *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871-72 (Tex.1978). To show that conduct caused an injury, the plaintiff must present evidence of cause in fact and foreseeability. *El Chico Corp.*, 732 S.W.2d at 313.

On the issue of a duty, Mr. Milner, a metallurgical engineer, testified that Goodrich was unreasonable in not designing the tire to be more resistant to breaks. He noted that a stronger and more uniform bead had been available since the early 1970s. Mr. Milner also explained how the breaks occur in the multi-strand bead tire, the type involved in this case. Testimony of Mr. Milner indicated that the tire industry was well aware of the tire failure problems due to mismatching, when a 16" tire was mounted on a 16.5" rim, since at least the early 1970s. Frank Timmons, a representative for the Rubber Manufacturer's Association, testified about a presentation he made in Japan regarding the history of and problems with the 16.5" wheel systems. Goodrich's prior Director of Industry Standards and

Appendix B

Government Relations was in attendance at the meeting to help urge the Japanese manufacturers not to introduce a 15.5" wheel system into the United States market because of the mismatching problems encountered with the 16.5" wheels.

Stanley Lew, a tire engineer for Goodrich for twenty years, testified that the single strand bead, advocated by Mr. Milner, was not foolproof and would still be dangerous if the mismatched tire and rim were used on the road. Mr. Lew did agree, however, that the single strand bead had some advantages. Goodrich bought a new machine in 1990 to convert to the single strand bead in 1991.

In considering the causation issue, our review of the record revealed that several witnesses, including Goodrich's experts, testified that if the tire had been made with the stronger, single strand bead, the explosion may not have occurred under the air pressure being used at the time of the accident. There was conflicting evidence, however, on what pressure was in the tire at the time of the explosion.

Ray Regalado, an employee working with Martinez on the day of the accident, verified that the exploding tire was the cause of a serious head injury to Martinez. Testimony from several doctors and Martinez's family confirmed the damages incurred by Appellee from the injury.

In reviewing the above evidence, the fact that the use of an alternative design may have prevented the accident was sufficient to indicate a lack of reasonableness by Goodrich. There is also sufficient evidence to establish that the weak tire bead was the cause of the explosion and the resulting injury and damages. We hold, therefore, that the evidence is adequate

to support the jury's finding of negligence, both legally and factually. Point of error one is overruled.

2. Design Defect

Appellant asserts, in its second point of error that there was either no evidence or insufficient evidence to support the jury's finding that the tire was defectively designed and that such design was a producing cause of Appellee's injuries.

Texas has recognized a strict liability cause of action for defective products, as set out in the Restatement Second of Torts § 402A, since 1967. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex.1967). The elements of proof for a defective product cause of action include:

(a) The product must be defective;

(b) The product must reach the consumer without substantial change from the time it leaves the possession and control of the manufacturer or seller;

(c) The defective condition of the product must render the product unreasonably dangerous;

(d) The unreasonably dangerous condition of the product must be the cause of the injury to the user.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). A product defect can be shown by either a manufacturing defect, a design defect, or a marketing defect. *Temple EasTex, Inc. v. Old*

Orchard Creek Partners, Ltd., 848 S.W.2d 724, 732 (Tex.App. — Dallas 1992, writ denied). Appellant contends, in its brief, that Plaintiff's failure to obtain a finding that the warning was inadequate precludes recovery under a defective design theory.[1] When an issue of defective design is alleged, however, the presence of a warning label is only one of many factors to be considered in determining the utility of a product. *Temple EasTex*, 848 S.W.2d at 724. The pleadings in this case alleged defective design, therefore a finding of the adequacy of the warning label was not required.

A product is defectively designed when it is unreasonably dangerous, taking into consideration the utility of the product and the risk involved in its use. *Turner v. General Motors Corp.*, 584 S.W.2d 844, 847 n. 1 (Tex.1979); *see also Acord v. General Motors Corp.*, 669 S.W.2d 111, 115-16 (Tex.1984). In a defective design case, both parties are to present evidence regarding several factors to consider in order to provide the trier of fact with appropriate balancing criteria. *Turner*, 584 S.W.2d at 849. Factors to consider that indicate a design defect include: (1) the availability of safer design alternatives, *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex.1980); (2) proof of similar accidents involving that same product, *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 855

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1. Appellant, however, cites only to cases involving an issue of marketing defect. *See Magro v. Ragsdale Bros.*, 721 S.W.2d 832, 834 (Tex.1986); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 603 (Tex.1972); *Blackwell Burner Co. v. Cerda*, 644 S.W.2d 512, 516 (Tex.App. — San Antonio 1982, writ ref'd n.r.e.); *Horak v. Pullman, Inc.*, 764 F.2d 1092, 1095 (5th Cir.1985); *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1275 (5th Cir.), *cert. denied*, 419 U.S. 1096, 95 S.Ct. 687, 42 L.Ed.2d 688 (1974); *Carter v. Johns-Manville Sales Corp.*, 557 F.Supp. 1317, 1320 (E.D.Tex.1983).

(Tex.Civ.App. — San Antonio 1968, writ ref'd n.r.e.); (3) subsequent changes or modifications in design, TEX.R.CIV.EVID. 407(a); (4) evidence of out-of-court experiments, *F.M.C. Corp. v. Burns,* 444 S.W.2d 315, 322 (Tex.Civ.App. — San Antonio 1969, no writ), and (5) expert testimony claiming a design defect TEX.R.CIV.EVID. 702, 703, 704; *General Electric Co. v. Schmal,* 623 S.W.2d 482, 484-85 (Tex.App. — Texarkana 1981, writ ref'd n.r.e.). *See Turner,* 584 S.W.2d at 849.

Our review of the evidence in favor of the jury's finding of a defective design shows that there is legally sufficient evidence to support the finding. Mr. Milner testified for Appellee that an alternative design with a stronger bead had been available since at least 1972. Testimony was also given verifying Goodrich's answer to interrogatories admitting to thirty-four known lawsuits involving the same product. Mr. Milner also testified that other tire manufacturers had switched to the stronger, single strand bead much sooner than Goodrich, who changed their design in 1991. Documentary evidence was introduced showing an experiment conducted by Goodrich in 1976 with mismatched 16.0" tires on 16.5" rims. This document verified that the tires could explode at 73 pounds per square inch of air pressure (P.S.I.). Mr. Milner clearly stated that he thought the Goodrich tire involved in the injury was defectively designed.

Further evidence was presented by both parties regarding Goodrich's design of the tire. Goodrich's design change was verified by Mr. Lew, who also testified that Goodrich had gone to a higher tensile wire in 1987. Mr. Lew contended that the current, technologically advanced machine for single strand was not available until 1986 for testing. He also claimed that the single strand design change was made to provide a smoother

ride with a more uniform tire. Mr. Lew stated that only one lawsuit had been filed since the warning label was placed on the tires, and in the lawsuit the customer had ordered a 16.5" tire and the mounter had improperly tried to mount a 16" tire.

Tom Conner, a forensic scientist, testified that it is not possible to get a complete bead seating when a 16" tire is put on a 16.5" rim. Mr. Conner also stated that there is a high risk of blowout on the road if the mismatch goes unnoticed. He discussed recent tests done by the major tire manufacturers where the tires did not fail until between 90 and 130 P.S.I.

Donald Avila, a tire engineer who worked for Goodyear Tire and Rubber Company for twenty years, testified that there is not an adequate solution available to avoid the mismatching explosions.

After reviewing all evidence presented by both parties on whether Goodrich's tire was defectively designed, we conclude that the jury's finding was not unjust. Evidence pointing to safer alternatives, similar accidents, and subsequent changes supports the jury's decision. *See Turner,* 584 S.W.2d at 849. Appellant's second point of error is overruled.

3. Gross Negligence

Appellant's third point of error challenges the legal and factual sufficiency of the evidence supporting the jury's finding that Goodrich was grossly negligent. The supreme court recently delineated the standard of review to be applied to gross negligence cases in *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 23 (Tex.1994). Because the appeal in this case was pending when the *Moriel* decision was handed down, we will

apply *Moriel. See Ellis County State Bank v. Keever,* 888 S.W.2d 790, 799 (Tex.1994). To establish gross negligence, the plaintiff must show, by a preponderance of the evidence, that:

> (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and
>
> (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, welfare and safety of others.

Moriel, 879 S.W.2d at 23; *see also* TEX.CIV.PRAC. & REM.CODE § 41.001(5) (Vernon Supp.1995). "Extreme risk" is a function of both the magnitude and probability of harm to the plaintiff. *Moriel,* 879 S.W.2d at 22; *Caterpillar, Inc. v. Shears,* 881 S.W.2d 923, 932 (Tex.App. — Corpus Christi 1994), *rev'd on other grounds,* 911 S.W.2d 379 (1995). The extreme risk prong is only satisfied by evidence showing " 'the likelihood of serious injury' to the plaintiff." *Moriel,* 879 S.W.2d at 22 (quoting *Wal-Mart Stores, Inc. v. Alexander,* 868 S.W.2d 322, 327 (Tex.1993)). The remote possibility of injury is not enough. *Moriel,* 879 S.W.2d at 21. An act or omission that is merely thoughtless or careless is not enough, the actor must proceed with actual conscious indifference to the risk. *Id.* at 20. The subjective conscious indifference is what distinguishes gross negligence from ordinary negligence. *Alexander,* 868 S.W.2d at 325. The defendant's subjective mental state may be proven by direct or circumstantial evidence. *Moriel,* 879 S.W.2d at 23.

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In reviewing the record for evidence of gross negligence, we consider all of the previously summarized evidence and would supplement the following: Mr. Milner, in testifying for Martinez, advocated that to increase safety the wire bead should be 50 thousandths tensile strength. Mr. Lew contradicted Mr. Milner's testimony by asserting that Goodrich had indeed changed to the stronger bead wire in 1987. Mr. Lew also described the one lawsuit since the pictorial warnings, emphasizing the mismatch hazard, had been placed on the 16" tires. The lawsuit involved a customer who requested a 16.5" tire and the mounter tried four times to get a 16" tire to seat correctly. Mr. Lew indicated that the mistake was made by the tire mounter. He also testified that there were drawbacks to the single strand bead and that Goodrich had waited until 1986, when a more technologically perfected machine was available, to begin testing for use of a single strand bead wire.

As previously noted, several witnesses testified that Goodrich was involved in trying to convince the Japanese manufacturers not to introduce a 15.5" tire because of the problems experienced with the 16.5" tire system. The evidence was conflicting on whether there was a "better" solution in designing tires so that they would not explode in a mismatch situation. Although Mr. Milner contended that a stronger, single strand bead was the solution, he also admitted that if the rim had been designed so it was easily distinguishable or would not accept the wrong size tire, no accident would have occurred. Mr. Lew, Mr. Avila, and Mr. Conner all testified that a tire with a stronger bead or single strand bead will still explode, depending on the air pressure in the tire.

Various tests involving tires designed by the major manufacturers were introduced by both parties. These tests

indicated that the lowest pressure range involving an explosion could occur over 73 P.S.I. (testing done by Goodrich on tires with the lower tensile strength bead in 1976), while most occurred at between 90 and 130 P.S.I. (current tires with the stronger bead). Mr. Milner and Mr. Regalado estimated the tire pressure at the time of the accident to be about 50 P.S.I. The normal pressure for the tire involved in the accident was 60 P.S.I. All of the experts agreed that it was unsafe to apply more than 40 P.S.I. when trying to seat the tire properly.

Although there is sufficient evidence to establish that an extreme risk was involved, the evidence of probability that harm would occur under normal circumstances is insufficient. Under normal pressure levels, the chances of an explosion was shown to be nonexistent by all test results introduced. Furthermore, only one suit involving a mismatched tire had been filed involving Goodrich since the warnings had been placed on the tires and the circumstances of that case indicated that the culpability fell strongly on the party mounting the tire.

The most questionable issue on gross negligence in this case, however, is whether Goodrich acted with conscious indifference. The evidence showed that Goodrich had clearly warned against the dangers of mismatch. When a manufacturer places a warning on a product, to protect against misuse, he can expect that the warning will be followed. RESTATEMENT OF TORTS (SECOND) § 402A cmt.i (1977). The testimony that Goodrich was involved in talks with the Japanese to discourage the introduction of another tire system with potential for mismatch problems, further indicated Goodrich's concern. The evidence also showed that although alternatives were available, there was not a fail-safe solution, that could be achieved by the tire manufacturers, to prevent a mismatch explosion. The only

evidence introduced that Goodrich was consciously indifferent to the possible harm resulting from a mismatch was the opinion testimony of Mr. Milner. All other evidence refutes that Goodrich disregarded the mismatch problems.

We find that the jury's decision on gross negligence is not supported by the bulk of the evidence and is unjust when reviewing all of the evidence presented. We affirm Appellant's third point of error.

4. Exemplary Damages

Appellant further challenges, in points of error four through seven, the trial court's rendering of the judgment to include exemplary damages based on the jury's verdict. An award of exemplary damages must be supported by a culpability finding of at least gross negligence. *See Moriel,* 879 S.W.2d at 16, 19. Because we do not find evidence to support the jury's decision on gross negligence, the award of exemplary damages cannot be upheld and we will not address points of error four through seven.

In point of error eight, Goodrich challenges the amount of exemplary damages, claiming that it should have been lowered to $4.1 million per a pre-trial agreement. Again, because of the unsupported finding on gross negligence, this point of error is now moot.

5. Contributory Negligence

In points of error nine through fourteen, Appellant asserts that there was either no evidence or insufficient evidence to support the jury's findings of no negligence or causation that contributed to Appellee's injuries by Budd, Ford, or Martinez.

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We will first review the evidence presented on the negligence of Budd and Ford in designing and manufacturing the rim. Mr. Milner, testifying for Appellee, stated that the tire manufacturers were aware that many of the 16.5" rims were still in use, even though Budd stopped manufacturing them in 1983. Mr. Milner offered his opinion that the rim was defective because the size was not clearly and conspicuously marked. He further stated that the condition of the rim was one cause of the accident. Mr. Martinez testified that the size of the rim should be placed near the valve system so it was easier to identify.

Mr. Conner, testifying for Appellant, suggested that the rim could be manufactured with a safety hump (as the Japanese had done) so that an improper tire could not be mounted. Mr. Conner also emphasized the need to have the rim size clearly marked near the valve for easy identification. Donald Scriver, a retired engineer for Budd, testified that it was feasible to put a more conspicuous marking near the valve. Mr. Lew testified that Budd had been involved in 132 lawsuits regarding the rim type involved in this case. Mr. Lew also described how the Japanese had designed their rim to reject a mismatched tire and had placed clear labels stating the size on each rim. Mr. Lew did concede, however, that the only thing that failed in this accident was the tire.

Although Appellant asserts that the evidence of Budd and Ford's negligence was uncontroverted, Appellant's own witness agreed that the tire was the only product that "failed." The evidence showed that Budd had stopped manufacturing the rim, and therefore could not redesign it; while Goodrich was in a position to design their tires to lower the chance of mismatch accidents. We find that this evidence was legally and factually

sufficient to support the jury's finding that Goodrich was 100% at fault.

Appellant also asserts that Martinez was contributorily negligent in changing the tire. Mr. Milner testified that a special gauge is required to measure the size of a tire rim and that no tire shops would have the gauge. He also stated that there is no way to tell, without trying to decipher the small coded numbers and letters on the rim, what size a rim is.

Mr. Vera, Martinez's employer at the time of the accident, testified that it is very difficult to tell the size of a rim. Mr. Regalado, who was working with Martinez when the accident occurred, described how he had taken six 16" tires off the truck and already mounted 16" tires on five of the rims with no problems. He also testified that the tire they took off of the last rim was a 16" tire. Martinez corroborated that the tire being replaced was a 16" tire and that he was following the same procedures he had followed many times in changing tires.

Mr. Conner emphasized in his testimony that a person should always check the markings on the rim to make sure there is a proper match. He conceded, however, that it is often difficult to determine the size of the rim.

Appellant also asserts that Martinez was negligent in putting excessive air pressure into the tire. Mr. Regalado testified that the pressure in the tire at the time of the accident was about 50 P.S.I.; Martinez was filling the tire to the required 60 P.S.I. after they heard it "seat" at about 38 P.S.I. Mr. Milner verified that in his opinion, considering the condition the tire was in after the accident, the pressure in the tire was about 50 P.S.I. when it exploded. Mr. Avila testified, however, that the

pressure had to have been at over 100 P.S.I. when it exploded because of the markings on the tire and the fact that the valve was broken.

In sum, the evidence indicates the difficulty in identifying the rim size, the fact that a 16" tire was taken off the rim involved in the accident, and that it appears Martinez was following the usual procedure when changing the tire. We find that there was sufficient evidence, both legally and factually, for the jury to determine that no part of the accident was attributable to Martinez's negligence.

Points of error nine through fourteen involving the contributory negligence of Budd, Ford and Martinez are overruled.

Appellant further asserts, in point of error fifteen, that there is no evidence, or alternatively, insufficient evidence for the jury's finding that Martinez did not contribute to the injury by failing to pursue rehabilitation.

Dr. Rossi, a neurologist who treated Martinez for three months in rehabilitation, testified that Martinez did not comprehend the extent of his injury or the need for further rehabilitation. Dr. Rossi attributed the lack of comprehension directly to the injury from the tire accident.

Donna Johnson, a vocational rehabilitation counselor, testified that further rehabilitation would be beneficial for Martinez. Martinez's wife testified that the family was willing to encourage further treatment, but she was unsure that her husband would cooperate. Martinez testified that he would not go through further rehabilitation unless his family could be close

by; he later testified that he would not enter rehabilitation again unless his wife threatened to leave him.

Dr. Seaton, a neuropsychiatrist who treated Martinez at the Tangrum Rehabilitation Center, testified that Martinez was a good candidate to successfully complete the rehabilitation program. He also testified that patients with conditions similar to Martinez could eventually become employed. Dr. Seaton agreed that Martinez's denial of a need for rehabilitation could be attributed to the brain injury he incurred.

Although the evidence was clear that Martinez did not follow through on rehabilitation, his perception of the need for further treatment was identified as a condition of his injury. We find, therefore, that the evidence was legally and factually sufficient to support the jury's finding that Martinez did not contribute to the injury by failing to pursue rehabilitation. Point of error fifteen is overruled.

6. Evidence

In points of error sixteen, seventeen, and eighteen, Appellant asserts that the trial court erred in admitting evidence of other lawsuits against Goodrich, subsequent design changes, and "the Milner timeline."

It is within the trial court's wide discretion to determine the admissibility of evidence. *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex.1989). A judgment will not be reversed based on improper admission of evidence unless the error "was reasonably calculated to cause and probably did cause rendition of an improper judgment . . ." TEX.R.APP.P. 81(b).

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Evidence of other lawsuits or claims is admissible if the events occurred under "reasonably similar but not necessarily identical circumstances." *Missouri-Kan.-Tex. R.R. Co. v. May,* 600 S.W.2d 755, 756 (Tex.1980); *see also Magic Chef, Inc. v. Sibley,* 546 S.W.2d 851, 855 (Tex.Civ.App. — San Antonio 1977, writ ref'd n.r.e.). Goodrich contends that Martinez offered no predicate indicating that the circumstances were similar in the other suits. The evidence of previous lawsuits was obtained through interrogatories in which Goodrich was asked to identify suits involving accidents resulting from a 16" Goodrich tire being mounted on a 16.5" rim. Goodrich was allowed to present, through the testimony of Mr. Lew, evidence that qualified the circumstances under which the lawsuits had been filed. We find that the size and mismatch problem, each resulting in an accident involving a Goodrich tire, indicate adequate similarity to negate a finding that the trial court abused its discretion in admitting the evidence of other lawsuits.

Subsequent design changes in a products liability case are specifically allowed under TEX.R.CIV.EVID. 407; *Chapa v. Garcia,* 848 S.W.2d 667, 671-72 n. 6 (Tex.1992). Furthermore, although Appellant argues that the design change was made to the light truck radial tires and not the light truck bias-ply tires involved in this case, we find nothing in the record that indicates this argument was presented to the trial court. Appellant had a running objection to the relevancy of design changes made to a "space saver" tire, but in subsequent testimony by Mr. Milner, Appellant did not object to the introduction of design changes incorporating the single strand bead into light truck tires. This issue was not properly preserved for review. TEX.R.APP.P. 52(a).

In requesting that the timeline, prepared by Mr. Milner, be admitted into evidence, Appellee pointed out that each of the

notations on the timeline was already in evidence through testimony of Mr. Milner. A chart summarizing previous testimony is rarely a source of reversible error. *See Southwestern Bell Tel. Co. v. Vollmer,* 805 S.W.2d 825, 832 (Tex.App. — Corpus Christi 1991, writ denied); *Houston Lighting & Power Co. v. Klein Indep. Sch. Dist.,* 739 S.W.2d 508, 519 (Tex.App. — Houston [14th Dist.] 1987, writ denied). Appellee introduced the timeline on the premise that it was prepared by Mr. Milner to clarify the sequence of events regarding the history of the mismatch problems in the tire industry. Trial courts have discretion, in order to aid the jury's understanding, to allow charts that summarize or even emphasize the testimony of a witness. *Speier v. Webster College,* 616 S.W.2d 617, 618-19 (Tex.1981). We find, therefore, that the trial court did not abuse its discretion in admitting the timeline that outlined Mr. Milner's testimony.

Because we find that the trial court did not abuse its discretion in admitting the above described evidence, there was no reversible error and points of error sixteen, seventeen, and eighteen are overruled.

7. Damages

Appellant urges, in points of error nineteen, twenty, and twenty-one, that there is factually insufficient evidence to support awards of $3 million in actual damages to Martinez, $500,000 to Juanita Martinez, and $1 million to each of Martinez's sons. In determining whether damages are excessive, we apply the same standard as for any factual sufficiency question. *Pope v. Moore,* 711 S.W.2d 622, 624 (Tex.1986).

Everett Dillman, an economic consultant, testified regarding Martinez's economic losses. The range of lost wages

was from $301,707 making $6 per hour until age sixty with no wage increases, to $725,000 for the average wage of a truck driver until age seventy. Mr. Dillman also calculated the cost at $5.3 million if Martinez were to require full time care for the remainder of his life. Mr. Dillman noted that these figures do not include any amounts for pain and suffering, disfigurement, or mental anguish. The actual medical bills amounted to $183,000.

Dr. Rossi testified that Martinez would not be able to live independently if his mother and wife were unable to care for him. He also testified that Martinez was not employable. Ms. Johnson agreed that Martinez was not employable in his current condition. Mrs. Martinez indicated that she was unsure of her future with her husband because of his hostile and violent behavior toward her and their sons.

As noted above, Dr. Seaton did testify that he evaluated Martinez as a good candidate for rehabilitation, but that Martinez did not agree with the need for further treatment. Dr. Seaton recognized that Martinez's failure to cooperate was a possible result of the brain injury.

From the above evidence the jury could have tabulated an amount for Martinez including previous medical expenses, lost wages, and future care in excess of the amount awarded. In reviewing the evidence presented on damages for Martinez, we find that there was factually sufficient evidence to support the award.

Appellant further challenges the award of $500,000 to Mrs. Martinez. Loss of spousal consortium is recognized in Texas to include "the mutual right of husband and wife to that

affection, solace, comfort, companionship, society, assistance and sexual relations necessary to a successful marriage." *Wal-Mart Stores, Inc. v. Alexander,* 868 S.W.2d 322, 328 (Tex.1993) (quoting *Whittlesey v. Miller,* 572 S.W.2d 665, 666 (Tex.1978)).

Mrs. Martinez testified that her husband was unable to help her with chores around the house and that he no longer fixed the family car or repaired broken appliances, as he had always done in the past. She testified that she needed to be very careful around Martinez, in order to avoid making him angry and violent. Mrs. Martinez described instances when her husband had threatened her and physically assaulted her, something he had never done prior to the accident. Mrs. Martinez testified that Martinez had become very jealous and possessive, often accusing her of spending time with other men. Dr. Rossi testified that it was very difficult for Mrs. Martinez to live with and care for her husband in his current condition and that the anger, jealousy, and paranoia was consistent with head injury cases. Mary Willis, Martinez's mother, also testified regarding the change in her son and that he had been a good provider, a good husband and father, and how difficult it was for Martinez's wife to deal with the changes in her husband.

We find that the above evidence was factually sufficient for the jury to award damages to Mrs. Martinez.

Finally, Appellant challenges the damage awards assessed for each of the children. The damages recoverable by children for loss of parental consortium include loss of the parent's "love, affection, protection, emotional support, services, companionship, care and society." *Reagan v. Vaughn,* 804 S.W.2d 463, 467 (Tex.1990). In determining the amount of damages, the jury may consider the severity of the injury, the

effect on the parent-child relationship, the child's age, and the nature of the child's relationship to the parent. *Id.*

Martinez's oldest son, Robert, testified that his dad no longer acted the same and that he was afraid of his dad. Robert also stated that Martinez was not "fun" anymore; he was often angry with the boys and hit them, something that Martinez had not done prior to the accident. Robert verified that he was 11 years old at the time of trial and his younger brother, John, testified that he was 8 years old. Mrs. Martinez reiterated that her husband became angry with the boys easily and that she could not trust Martinez to stay alone with his sons. She testified about several occurrences where Martinez had discussed very inappropriate topics with the boys and encouraged unacceptable behavior. Mrs. Martinez also testified that her husband, prior to the accident, was very involved with the boys and always took them on family outings to places such as the zoo or the beach.

Based on the evidence presented, we find that there was factually sufficient evidence for the jury to assess damages at $1 million for each child, considering their age and the drastic change in the relationship and support they can expect to receive from their father for the remainder of their lifetimes.

8. Conclusion

In sum, we affirm the trial court's judgment in so far as it relates to the awards of actual damages for Martinez, Juanita Martinez and Robert and John Martinez. We reverse and render that part of the judgment awarding exemplary damages and hold that Appellee take no exemplary damages. All other aspects of the judgment are affirmed.

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GREEN, Justice, dissenting.

The jury's verdict of no negligence or causation on the part of the plaintiff and the other defendants is so against the great weight and preponderance of the evidence that it is manifestly unjust. The case should be reversed and remanded for a new trial. Therefore, I respectfully dissent.

It is unchallenged that the tire in question exhibited adequate warnings against the very conduct of the plaintiff that caused the accident in which he was injured. That the plaintiff ignored the warnings is conclusive proof of his negligence.

There is also conclusive evidence of contributing causation on the part of appellant's co-defendants, Ford and Budd. The evidence was undisputed that Ford and Budd had introduced 16.5" wheel rims into a marketplace where 16" tires were common, posing a potential for great harm to both the installers and users of 16" tires. There was also evidence that the rims were defective because they were not conspicuously marked as 16.5" rims, and that the defect was a cause of the accident. Evidence was introduced that the rims could easily have been designed in such a way to reject mismatched tires.

In support of the verdict, the majority disregards the great weight of the evidence of Ford and Budd's causation, concluding that the jury was entitled to rely on the fact that the tire was the only product to "fail" in finding Goodrich 100% at fault. But it is clear from the evidence that the only reason the tire failed was because it was placed on a defective and mismatched rim. It did not fail because of a self-contained defect.

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The greater weight and preponderance of the evidence establishes that the plaintiff, Ford and Budd were each, to some undetermined degree, the cause of the plaintiff's injuries. Accordingly, I would reverse and remand the case for a new trial.

APPENDIX C — JUDGMENT OF THE DISTRICT COURT FOR THE 79TH JUDICIAL DISTRICT, BROOKS COUNTY, TEXAS DATED, ENTERED AND FILED MAY 5, 1993

IN THE DISTRICT COURT
79TH JUDICIAL DISTRICT

BROOKS COUNTY, TEXAS

NO. 4885

ROBERTO O. MARTINEZ, ET AL

VS.

B. F. GOODRICH AND THE UNIROYAL GOODRICH TIRE COMPANY

JUDGMENT

Be it remembered that on the 5th day of April, 1993, came on to be heard the above styled and numbered cause, wherein Roberto O. Martinez and Juanita Martinez, individually and as next friends of Robert Martinez, Jr. and John Mathew Martinez, minors, and Mary Willis are Plaintiffs, and B. F. Goodrich and The Uniroyal Goodrich Tire Company are Defendants, and the parties appeared in person and through their attorneys of record and announced ready for trial; and thereafter a jury having been demanded, twelve jurors were impanelled and sworn. The parties proceeded to present their evidence, stipulations and arguments, during which Plaintiffs announced in open court that Plaintiff Mary Willis was taking a non-suit as to the Defendants, B. F. Goodrich and The Uniroyal Goodrich Tire Company. After both parties rested and closed, the Court did

submit to the jury its charge, and thereafter the jury did return into court with its unanimous verdict finding the Defendant, Uniroyal Goodrich Tire Company liable to the Plaintiffs for the Defendant's defective product, negligence, and gross negligence and awarding Roberto Martinez $3,000,000.00 in actual damages and $9,000,000.00 in punitive damages, Juanita Martinez $500,000.00 in actual damages and $500,000.00 in punitive damages, Robert Martinez, Jr. $1,000,000.00 in actual damages and $1,000,000.00 in punitive damages, and John Mathew Martinez $1,000,000.00 in actual damages and $1,000,000.00 in punitive damages. The Court after receiving same and considering a pretrial agreement of the parties to limit punitive damages to one time the amount of actual damages awarded to the Plaintiffs with respect to each Defendant is of the opinion that the following judgment should be rendered.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That Roberto Martinez, do have and recover of and from Defendant, The Uniroyal Goodrich Tire Company, the sum of Three Million and No/100 Dollars ($3,000,000.00) as actual damages, plus Three Million and No/100 Dollars ($3,000,000.00) as punitive damages and prejudgment interest in the amount of Three Hundred Eleven Thousand One Hundred Seventy-Seven and 90/100 Dollars ($311,177.90), less a credit of One Million Two Hundred Thousand and No/100 Dollars ($1,200,000.00) for the Plaintiff's pretrial settlement with Ford Motor Company and The Budd Company, for a total judgment of Five Million One Hundred Eleven Thousand One Hundred Seventy-Seven and 90/100 Dollars ($5,111,177.90).

2. That Juanita Martinez, do have and recover of and from Defendant, The Uniroyal Goodrich Tire Company, the sum of

Five Hundred Thousand and No/100 Dollars ($500,000.00) as actual damages, plus Five Hundred Thousand and No/100 Dollars ($500,000.00) as punitive damages and prejudgment interest in the amount of Sixty-nine Thousand One Hundred Fifty and 95/100 Dollars ($69,150.95), less a credit of One Hundred Thousand and No/100 Dollars ($100,000.00) for the Plaintiff's pretrial settlement with Ford Motor Company and The Budd Company, for a total judgment of Nine Hundred Sixty-Nine Thousand One Hundred Fifty and 95/100 Dollars ($969,150.95).

3. That Robert Martinez, Jr., do have and recover of and from Defendant, The Uniroyal Goodrich Tire Company, the sum of One Million and No/100 Dollars ($1,000,000.00) as actual damages, plus One Million and No/100 Dollars ($1,000,000.00) as punitive damages and prejudgment interest in the amount of One Hundred Sixty-four Thousand Two Hundred Thirty-one and 82/100 Dollars ($164,231.82), less a credit of Fifty Thousand and No/100 Dollars ($50,000.00) for the Plaintiff's pretrial settlement with Ford Motor Company and The Budd Company, for a total judgment of Two Million One Hundred Fourteen Thousand Two Hundred Thirty-One and 80/100 Dollars ($2,114,231.80).

4. That John Mathew Martinez, do have and recover of and from Defendant, The Uniroyal Goodrich Tire Company, the sum of One Million and No/100 Dollars ($1,000,000.00) as actual damages, plus One Million and No/100 Dollars ($1,000,000.00) as punitive damages and prejudgment interest in the amount of One Hundred Sixty-four Thousand Two Hundred Thirty-one and 82/100 Dollars ($164,231.82), less a credit of Fifty Thousand and No/100 Dollars ($50,000.00) for the Plaintiff's pretrial settlement with Ford Motor Company

and The Budd Company, for a total judgment of Two Million One Hundred Fourteen Thousand Two Hundred Thirty-One and 80/100 Dollars ($2,114,231.80).

It is further ORDERED that execution issue if the above be not timely paid.

It is further ORDERED, ADJUDGED and DECREED that said sums listed above shall bear interest at the rate of ten percent (10%) per annum until paid, for which let execution issue if the same be not timely paid.

It is further ORDERED, ADJUDGED and DECREED that costs of court are hereby taxed against the Defendant, The Uniroyal Goodrich Tire Company, for which let execution issue if the same be not timely paid.

SIGNED and ORDERED ENTERED this 5th day of May, 1993.

s/ [illegible]
Judge Presiding

APPENDIX D — CHARGE OF THE COURT TO THE JURY AND SPECIFIC FINDINGS OF THE JURY OF THE DISTRICT COURT FOR THE 79TH JUDICIAL DISTRICT, BROOKS COUNTY, TEXAS DATED AND FILED APRIL 14, 1993

IN THE DISTRICT COURT
79TH JUDICIAL DISTRICT

BROOKS COUNTY, TEXAS

NO. 4885

ROBERTO O. MARTINEZ AND JUANITA MARTINEZ, INDIVIDUALLY AND AS NEXT FRIENDS OF ROBERT MARTINEZ, JR. AND JOHN MATHEW MARTINEZ, MINORS

VS.

B. F. GOODRICH AND THE UNIROYAL GOODRICH TIRE COMPANY

CHARGE OF THE COURT TO THE JURY

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which

you should carefully and strictly follow during your deliberations.

(1) Do not let bias, prejudice or sympathy play any part in your deliberations.

(2) In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court — that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

(3) Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

(4) You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss or concern yourselves with the effect of your answers.

"Negligence" means failure to use ordinary care; that is to say, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary Care" means that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances.

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"Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event, but there can be only one sole proximate cause. If an act or omission of any person not a party to the suit was the sole proximate cause of an occurrence, then no act or omission of any other person could have been a proximate cause.

"Producing cause" means an efficient, exciting, or contributing cause which, in a natural sequence produced the occurrence. There may be more than one producing cause. There may be more than one cause of an occurrence, but if an act or omission of any person not a party to the suit was the sole cause of the occurrence, then no act, omission, or product of any party to the suit could have been a cause of the occurrence.

You are instructed that a corporation acts through its agents and employees and that the acts of the agents or employees are the acts of a corporation.

(5) You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers — that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

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(6) You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other juror who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in questions in a sense which varies from the meaning commonly understood, you will be given in this charge a proper legal definition, which you are bound to accept in place of any other definition or meaning.

Answer "Yes" or "No" unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No."

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The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires other than "Yes" or "No," your answer must be based on a preponderance of the evidence.

QUESTION NO. 1

Did the negligence, if any, of the persons named below proximately cause the occurrence in question?

Answer "Yes" or "No" for each of the following:

a. Uniroyal Goodrich Tire Company Yes

b. The Budd Company No

c. Ford Motor Company No

d. Roberto Martinez No

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If, in answer to Question 1, you have found that the negligence of The Uniroyal Goodrich Tire Company proximately caused the occurrence, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION NO. 2

Was such negligence of The Uniroyal Goodrich Tire Company "gross negligence"?

> "Gross negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare, or safety of the persons affected by it.
>
> Answer "Yes" or "No."
>
> ANSWER: Yes

QUESTION NO. 3

Was there a design defect in the Goodrich tire at the time it left the possession of Goodrich that was a producing cause of the occurrence in question?

> A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.
>
> Answer "Yes" or "No"
>
> ANSWER: Yes

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QUESTION NO. 4

Was there a design defect in the wheel or rim as specified by Ford Motor Company at the time it left the possession of the Budd Company that was a producing cause of the occurrence in question?

A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Answer "Yes" or "No"

ANSWER: No

QUESTION NO. 5

Was there a design defect in the wheel or rim at the time it left the possession of the Budd Company that was a producing cause of the occurrence in question?

A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Answer "Yes" or "No"

ANSWER: No

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If, in answers to Questions 1, 3, 4 or 5, you have found that more than one of the parties acts, omissions, or product caused the injury, then answer the following questions. Otherwise, do not answer the following questions.

The percentages you find must total 100 percent. The percentage of causation attributable to a party or product is not necessarily measured by the acts, omissions, or product defects found.

QUESTION NO. 6

For each of those found by you to have caused the occurrence, find the percentage caused by:

The Uniroyal Goodrich Tire Company and the tire	100 %
Ford Motor Company and the rim	0 %
The Budd Company and the rim	0 %
Roberto Martinez	0 %
Total	100 %

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QUESTION NO. 7

If, in answer to Question 6 you have found that a percentage of the occurrence in question was caused by Roberto Martinez, then answer the following question. Otherwise, do not answer the following question.

What percentage, if any, of the causation assigned by you to Roberto Martinez did you attribute to his failure, if any, to mitigate his damages?

Answer with a percentage:

ANSWER: 0 %

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If you have answered "Yes" to Question No. 1, 3, 4 or 5, then answer the following questions. Otherwise, do not answer the following questions.

QUESTION NO. 8

What sum of money, if paid now in cash, would fairly and reasonably compensate Roberto Martinez for his injuries, if any, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find. Do not include any amount for any condition not resulting from the occurrence in question.

a. Physical pain and mental anguish

b. Medical care and expenses

c. Loss of earning capacity

d. Physical impairment

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Roberto Martinez.

Answer in dollars and cents for damages, if any, that were sustained in the past and that in reasonable probability will be sustained in the future:

Answer: $3,000,000.

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QUESTION NO. 9

What sum of money, if paid now in cash, would fairly and reasonably compensate Juanita Martinez for injuries, if any, to her husband, Roberto Martinez, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

a. Loss of household services.

"Household services" means the performance of household and domestic duties by a spouse to the marriage.

b. Loss of consortium

"Consortium" means the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, sexual relations, emotional support, love, and felicity necessary to a successful marriage.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Roberto Martinez.

Answer in dollars and cents for damages, if any, that were sustained in the past and that in reasonable probability will be sustained in the future.

Answer: $500,000

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QUESTION NO. 10

What sum of money, if paid now in cash, would fairly and reasonably compensate Roberto Martinez, Jr. and John Mathew Martinez for the loss, if any, of parental consortium that resulted from the physical injury to Roberto Martinez?

> "Parental consortium" means the positive benefits flowing from the parent's love, affection, protection, emotional support, services, companionship, care, and society."

In considering your answer to this question, you may consider only the following factors: the severity of the injury to the parent and its actual effect on the parent-child relationship, the child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics, and whether other consortium-giving relationships are available to the child.

Do not include interest on any amount of damages you find. Do not reduce the amounts, if any, in your answer because of the negligence, if any, of Roberto Martinez.

Answer in dollars and cents for damages, if any, that were sustained in the past and that in reasonable probability will be sustained in the future by:

Roberto Martinez, Jr.:

Answer: $1,000,000

John Mathew Martinez

Answer: $1,000,000

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If you have answered "Yes" to Question 2, answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 11

What sum of money, if any, should be assessed against The Uniroyal Goodrich Tire Company and awarded to the following individuals as exemplary damages?

> The term "exemplary damages" is an amount which you may, in your discretion, award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Answer in dollars and cents for damages, if any.

Roberto Martinez	$9,000,000.
Juanita Martinez	$500,000.
Roberto Martinez, Jr.	$1,000,000.
John Mathew Martinez	$1,000,000.

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After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror —

1. to preside during your deliberations,

2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,

3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,

4. to vote on the questions,

5. to write your answers to the questions in the spaces provided, and,

6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

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When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into the Court with your verdict.

s/ [illegible]
JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

s/ Raul Guena Jr.
PRESIDING JUROR

* * * *

APPENDIX E — PRONOUNCED ORDER AND LETTER ORDER OF THE SUPREME COURT OF TEXAS DATED NOVEMBER 12, 1998 OVERRULING THE MOTION FOR REHEARING

THE SUPREME COURT OF TEXAS

Orders Pronounced November 12, 1998

* * *

ORDERS ON MOTIONS

THE FOLLOWING MOTIONS FOR REHEARING OF CAUSES ARE OVERRULED:

95-1159 UNIROYAL GOODRICH TIRE COMPANY v. ROBERTO O. MARTINEZ and JUANITA MARTINEZ, individually and as next friends of ROBERT MARTINEZ, JR., and JOHN MATHEW MARTINEZ, minors; from Brooks County; 4th district (04-93-00526-CV, 928 SW2D 64, 10-04-95)

* * *

Appendix E

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 12, 1998

Justice Alma L. Lopez
The Fourth Court of Appeals
Bexar County Justice Center
300 Dolorosa, Suite 3200
San Antonio, Tx 78205

Mr. John B. Kyle
Kyle & Mathis
8300 Douglas, Suite 700
Dallas, TX 75225

Mr. Jack Pew, Jr.
Jackson & Walker
901 Main Street, Suite 6000
Dallas, TX 75202-3797

Ms. Dena L. Mathis
Kyle & Mathis
8300 Douglas, Suite 700
Dallas, Tx 75225

Mr. Frank C. Vecella
Jackson & Walker
901 Main Street, Suite 6000
Dallas, TX 75202-3797

Mr. Steve T. Hastings
Huerta, Hastings & Allison
920 Leopard Street
Corpus Christi, TX 78401

Mr. Todd W. White
White White & Hamilton
118 East Rusk Street
Rockwall, TX 75807

Ms. Karen Kennedy
Allison & Huerta
920 Leopard Street
P.O. Box 23080
Corpus Christi, Tx 78403-3030

Ms. Rebecca E. Hamilton
White White & Hamilton
118 East Rusk Street
Rockwall, TX 75087

Mr. Guy H. Allison
The Allison Law Firm
920 Leopard Street
Corpus Christi, TX 78401

Appendix E

RE: Case Number 95-1159
Court of Appeals Number: 04-93-00526-CV
Trial Court Number: 4885

Style: UNIROYAL GOODRICH TIRE COMPANY v. ROBERTO O. MARTINEZ and JUANITA MARTINEZ, individually and as next friends of ROBERTO MARTINEZ, JR., and JOHN MATHEW MARTINEZ, minors

Dear Counsel:

Today, the Supreme Court of Texas overruled the second motion for rehearing in the above referenced cause.

Sincerely,

John T. Adams, Clerk

by s/ Michael H. Kopp
Michael H. Kopp, Deputy

cc The Honorable David Peeples
Mr. Pedro Martinez, District Clerk
The Honorable Ben Martinez